(24,805)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 172.

J. D. BOWERSOCK, PLAINTIFF IN ERROR,

vs.

ADA BURHANS SMITH, ADMINISTRATRIX OF THE ESTATE OF SUMNER I. SMITH, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

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a In the Supreme Court of the State of Kansas.

No. 19371.

ADA BURHANS SMITH, Adm'x, etc., Appellee,
vs.
J. D. BOWERSOCK, etc., Appellant.

Be it remembered, that on the 18th day of March, 1914, there was filed in the office of the Clerk of the Supreme Court of the state of Kansas a certified copy of the journal entry of judgment and of the notice of appeal, together with the proof of service thereof in the above entitled cause which journal entry of judgment and notice of appeal are in the words and figures as follows, to-wit:

b 19371.

In the District Court of Douglas County, Kansas.

Filed Mar. 18, 1914. D. A. Valentine, Clerk Supreme Court.

ADA BURHANS SMITH, Administratrix of the Estate of Sumner I. Smith, Deceased, Plaintiff,
vs.
J. D. BOWERSOCK, Doing Business as The Lawrence Paper Manufacturing Company, Defendant.

Journal Entry of Judgment.

Now on this 18th. day of June, A. D. 1913, this cause came regularly on for hearing, the above named plaintiff appearing in person and by her attorneys, J. H. Mitchell, Esq., and S. D. Bishop, Esq., also came the above named defendant in person and by his attorneys W. B. Brownell, and Judge Moore; also came the following named persons as jurors, to wit; George Hildebrand, Julius Zeeb, B. A. Ewing, G. H. Nichols, Charles Bailey, T. E. Clark, Joe Sturdy, George Michael Thomas Pugh, W. Jackson, A. K. Stevens and H. A. Rogers, who were duly impannelled, cautioned and sworn to try the cause herein, and thereupon said cause proceeded to trial; and the jury having heard all the evidence introduced by the plaintiff, and the defendant, the argument of counsel and the charge of the court retired to their jury room in charge of a sworn bailiff and after due deliberation, the said jury came into open court with their verdict in writing, signed by the former, which verdict is as follows, to wit:

In the District Court of Douglas County, Kansas.

ADA BURHANS SMITH, Administratrix, etc., Plaintiff,
vs.
J. D. BOWERSOCK, Doing Business as The Lawrence Paper Manufacturing Company, Defendant.

Verdict.

We the jury in this case find for the plaintiff and we assess the amount of her recovery at $10,000.00/100.

G. G. MICHAEL.

which verdict was duly read in open court as required by law; and thereupon there being no further proceedings to be had before said jury, the said jury was then and there by the court duly dis-
c charged from any further consideration in said cause.

It is therefore ordered, considered and adjudged by the court that the said plaintiff have judgment against said defendant in the sum of Ten Thousand dollars, with interest thereon at the rate of six per cent per annum from the eighteenth day of June A. D. 1913, and for the costs of this action herein taxed at $51.00.

Exhibit A.

d In the District Court of Douglas County, Kansas.

ADA BURHANS SMITH, Administratrix, Plaintiff,
vs.
J. D. BOWERSOCK, Doing Business as The Lawrence Paper Manufacturing Co., Defendant.

Notice.

To Ada Burhans Smith, Administratrix, plaintiff, and to Messers. S. D. Bishop and J. H. Mitchell, attorneys of record for the plaintiff in the above entitled cause:

You will please take notice that the undersigned defendant J. D. Bowersock doing business as The Lawrence Paper Manufacturing Company has this 17th day of March A. D. 1914, filed his notice of appeal to the Supreme Court of Douglas County Kansas, appealing from the order overruling the demurrer to the evidence, the refusal of the Court to give certain instructions asked by the defendant and the giving of instructions by the court contrary to the rights of the defendant, the verdict of the Jury against the defendant for Ten Thousand Dollars, and costs, the judgment of the court thereon, and order of the court overruling the motion for a new trial filed by the defendant, and all other orders and rulings of the court as against the rights of the defendant in the above

entitled cause; a copy of which notice is hereto attached and made a part hereof.

J. D. BOWERSOCK,
Doing Business as The Lawrence Paper Manufacturing Company.
By W. B. BROWNELL,
His Attorney.

Service of a copy of the within and foregoing notice of appeal filed in the above entitled cause in the office of the Clerk of the District Court of Douglass County Kansas on the 17th day of March, 1914, acknowledged this 17th day of March 1914.

S. D. BISHOP,
J. H. MITCHELL,
Attorneys for Plaintiff.

In the District Court of Douglas County, Kansas.

No. 10823.

ADA BURHANS SMITH, Administratrix, Plaintiff,
vs.
J. D. BOWERSOCK, Doing Business as The — Paper Manufacturing Company, Defendant.

Notice of Appeal.

To Ada Burhans Smith, Administratrix, plaintiff, and to Messrs. S. D. Bishop and J. H. Mitchell, attorneys of record for the plaintiff in the above entitled cause:

You will please take notice that the undersigned defendant appeals to the Supreme Court of the State of Kansas, from the order overruling the demurrer to the evidence, the refusal of the court to give certain instructions asked by the defendant and the giving of instructions by the Court contrary to the rights of the defendant, the verdict of the Jury against the defendant for Ten Thousand Dollars and costs, the judgment of the court thereon, the order of the court overruling the motion for a new trial filed by the defendant, and all other orders and rulings of the court as against the rights of the defendant in the above entitled cause.

Certificate of Copy.

STATE OF KANSAS,
County of Douglas, ss:

I, Chas. E. Moss, Clerk of the District Court in and for said county and state, do hereby certify that the above and foregoing is a true and complete copy of the original Journal Entry of Judgment and Notice of Appeal in the case of Ada Burhans Smith Administratrix

of the estate of Sumner I. Smith, Deceased, vs. J. D. Bowersock, doing business as the Lawrence Paper Manufacturing Co. No. 10823 as the same now appears of record and on file in my office.

Witness my hand and the seal of said court affixed at my office in the City of Lawrence this 17th day of March, A. D. 1914.

CHAS. E. MOSS, *Clerk*,
By —— ——, *Deputy*.

f In the District Court of Douglas County, Kansas.

No. 10823.

ADA BURHANS SMITH, Administratrix of the Estate of Sumner I. Smith, Deceased,
vs.
J. D. BOWERSOCK, Doing Business as The Lawrence Paper Manufacturing Company, Defendant.

Journal Entry.

Now upon this 17th day of January A. D. 1914, this cause came regularly on for hearing on the motion of the defendant for a new trial, the above named plaintiff appearing by her attorneys J. H. Mitchell, Esq., and S. D. Bishop, Esq., and the above named defendant by his attorney W. B. Brownell, Esq.,

And the Court, after listening to the argument of counsel and being fully advised in the premises, doth overrule said defendant's motion for a new trial.

It is therefore ordered, considered and adjudged by the Court that the motion for a new trial be and the same is hereby overruled, and that the verdict of the Jury heretofore rendered in the above entitled action, to wit: on the 18th day of June 1913, be and the same is hereby approved, and the judgment heretofore rendered by the court on the 18th day of June 1913 is hereby affirmed.

(Endorsed:) No. 19371. In the District Court of Douglas County, Kansas. Ada Burhans Smith, Adm'x, Appellee, vs. J. D. Bowersock, etc. Appellant. Notice of Appeal and Transcript. Filed Mar. 18, 1914. D. A. Valentine, Clerk Supreme Court.

g And afterwards, on the 14th day of August, 1914, there was filed in the office of the clerk of the Supreme Court of the State of Kansas, appellant's abstract of the record, which abstract is in the words and figures as follows, to-wit:

1 Filed Aug. 14, 1914. D. A. Valentine, Clerk Supreme Court.

Number 19371.

In the Supreme Court of Kansas.

ADA BURHANS SMITH, Administratrix of the Estate of Sumner I. Smith, Deceased, Appellee,

vs.

J. D. BOWERSOCK, Doing Business as The Lawrence Paper Manufacturing Company, Appellant.

Appeal from the District Court of Douglas County, Kansas.

Honorable Charles A. Smart, Judge.

APPELLANT'S ABSTRACT.

W. B. Brownell, Lawrence, Kansas; McCabe Moore, Kansas City, Kansas, Attorneys for Said Appellant.

1½ In the Supreme Court of Kansas.

Number 19371.

ADA BURHANS SMITH, Administratrix of the Estate of Sumner I. Smith, Deceased, Appellee,

vs.

J. D. BOWERSOCK, Doing Business as the Lawrence Paper Manufacturing Company, Appellant.

Appeal from the District Court of Douglas County, Kansas.

Honorable Charles A. Smart, Judge.

Appellant's Abstract.

Pleadings.

Said Ada Burhans Smith, filed an amended petition in said cause in the District Court of Douglas County, Kansas, on the 24th day of January, A. D. 1913, which was and is in figures as follows:

2 In the District Court of Douglas County, Kansas.

No. 10823.

ADA BURHANS SMITH, Administratrix of the Estate of Sumner I. Smith, Deceased, Plaintiff,

vs.

J. D. BOWERSOCK, Doing Business as the Lawrence Paper Manufacturing Company, Defendants.

Amended Petition.

Comes now Ada Burhans Smith, the above named plaintiff, a resident of Elkhart, State of Indiana, and for her cause of action against the said defendant, J. D. Bowersock, doing business as the Lawrence Paper Manufacturing Company, alleges and shows to the court:

1. That the said plaintiff is the duly appointed and acting administratrix of the estate of Sumner I. Smith, deceased, and that she was appointed such administratrix on the 29th day of March, 1912, by the superior court of the County of Elkhart, State of Indiana, and that said court is one having probate jurisdiction within the State of Indiana.

2. That the said defendant, J. D. Bowersock, is a resident of the City of Lawrence, Douglas County, Kansas, and now is and was at all of the dates and times hereinafter mentioned the owner and operator of the Lawrence Paper Manufacturing Company, which said company was doing business at Lawrence, Kansas, at the time of the grievances hereinafter set out.

3. That in carrying on and conducting the business of the Lawrence Paper Manufacturing Company, and in the manufacture of the products of the same, the said defendant at all of the dates and times herein mentioned, used and operated a large amount
3 of machinery in and about the building wherein said business was carried on, and among other articles of machinery, there were used in said manufacturing establishment, the following of the machinery and equipment of said manufacturing establishment, and that the aforesaid squeeze rolls, dry rolls and dryer felt rolls so as aforesaid used by the said defendant in carrying on and conducting the aforesaid business of the Lawrence Paper Manufacturing Company were dangerous to the lives and limbs of the persons or employees employed by said defendant in said establishment.

4. That on the 28th day of November, 1911, the said Sumner I. Smith was in the employ of said defendant as a superintendent of said manufacturing establishment, and while in the discharge of his duty as such employee was ordered and directed by one P. A. Dinsmore, his superior and the assistant manager of said manufacturing establishment, to adjust the aforesaid squeeze rolls, and the said Sumner I. Smith, in obedience to these orders, while

attempting to adjust the aforesaid squeeze rolls, fell and was caught between the dry rolls and dryer felt rolls and was then and there fatally injured and crushed, from the effects of such injuries the said Sumner I. Smith, on the 28th day of November, 1911, then and there immediately died.

5. That it was practicable to have provided said squeeze rolls, dry rolls and dryer felt rolls with proper and safe guards or
4 screens, but that such guards or screens were not provided by said defendant for said squeeze rolls, dry rolls and dryer felt rolls and the absence of such guards or screens directly contributed to and was the approximate cause of the death of the said Sumner I. Smith, as aforesaid.

6. That at the date of his death, the said Sumner I. Smith was a person of perfect health, about the age of thirty-three years, and was earning at the time of his death, and for a long time prior thereto, the sum of one hundred and fifty dollars per month.

7. That the said Sumner I. Smith left surviving him, as his sole heir at law, his wife, Ada Burhans Smith, plaintiff herein, who was solely dependent on him for her support and maintenance.

8. Plaintiff says that by reason of the death of her said husband, Sumner I. Smith, on account of the failure of the said J. D. Bowersock to properly guard and screen the aforesaid machinery, she has been damaged in the sum of ten thousand ($10,000.00) dollars.

Wherefore, plaintiff prays judgment against the said defendant, J. D. Bowersock, for the sum of ten thousand dollars ($10,000.00), her damages so as aforesaid sustained, and for the costs of this action.

J. H. MITCHELL,
S. D. BISHOP,
Attorneys for Plaintiff.

5 Said J. D. Bowersock filed a verified answer to said amended petition, which answer (omitting caption) was in words and figures as follows:

Answer.

Comes now J. D. Bowersock, doing business as The Lawrence Paper Manufacturing Company, defendant herein, and for his answer to the amended petition of Ada Burhams Smith, administratrix of the estate of Sumner I. Smith, deceased, alleges and shows to the court:

1. That said defendant denies that the plaintiff herein has capacity to sue in said action and demand the relief sought.

2. Said defendant alleges that on or about the 28th day of November, 1911, one Sumner I. Smith was the superintendent of and in charge of the manufacturing establishment of the defendant herein, and said defendant alleges that as such superintendent said Sumner I. Smith had the complete direction of said manufacturing plant, and among other things, had the direction, control, management of repairs and safe-guarding of all machinery in said manufacturing establishment; and defendant further alleges that if said

Sumner I. Smith was injured on said date and died from said injuries, he was injured by reason of his own carelessness and negligence, in that while attempting to adjust certain squeeze rolls, he, the said Sumner I. Smith, carelessly and negligently put his hands into the said machinery and was caught by reason of his said negligent acts, by said machinery and was drawn therein,
6 and suffered the alleged injuries complained of.

3. Said defendant further answering, says that it was not practicable to provide the rolls and machinery with guards or screens, as alleged in said amended petition, and that the absence of such guards of screens or failure to provide them, as alleged in said amended petition, was not the proximate cause of nor did the same directly contribute to the alleged injury and death of the said Sumner I. Smith.

4. Defendant further alleges that said Sumner I. Smith, by reason of his being superintendent and having the entire control and management of said manufacturing plant as herein alleged, assumed the risks of any dangers arising from said machinery, and if said machinery was not properly guarded or screened, said Sumner I. Smith was responsible therefor, and assumed the risk thereof.

5. Said plaintiff further answering, denies each and every allegation in plaintiff's amended petition contained not herein specifically admitted.

Wherefore, said defendant prays that he go hence with his costs.

W. B. BROWNELL,
Attorney for Defendant.

STATE OF KANSAS,
Douglas County, ss:

J. D. Bowersock being duly sworn, says; that he is the defendant in the above entitled action; that he has read the foregoing
7 answer, and that the facts therein stated are true.

[Seal of Notary.] J. D. BOWERSOCK.

Subscribed and sworn to before me this 15th day of May, 1913.

GERTRUDE STANDING,
Notary Public.

My commission expires July 5, 1915.

A reply to said answer was filed consisting of a general denial.

Said cause was tried upon said amended petition, answer and reply, before the court and a jury, resulting in a verdict for the plaintiff in the sum of $10,000.

The Trial

was begun on the 17th day of June, A. D. 1913, at the May term of said court, said Ada Burhans Smith, appearing in person and by

S. D. Bishop and J. H. Mitchell her attorneys, and appellant appearing in person and by W. B. Brownell and McCabe Moore his attorneys.

Said appellee, to maintain the issues on her part, introduced in evidence a certified copy of letters of administration issued to her by the Superior Court of Elkhart County, Indiana marked "Exhibit A" which was and is in words and figures as follows:

"Proceedings in the Department of Probate of the Elkhart Superior Court.

Be it remembered that on the 29th day of March, 1913, Ada Burhans Smith filed in the office of the clerk of the said
8 court her application for her appointment as administratrix of the estate of Sumner I. Smith late of Douglas County, Kansas, deceased, together with a bond in the penal sum of $200.00, with Chas. S. Burhans as surety thereon, which bond was on said day duly approved, and thereupon said clerk issued to said applicant the following letters of administration, to-wit:

Letters of Administration.

STATE OF INDIANA,
Elkhart County, ss:

I, Chas. A. Aitken, clerk of the Superior Court of said county, hereby certify that administration of the estate of Sumner I. Smith, late of Douglas County, Kansas, deceased, who died intestate, is granted to Ada Burhans Smith, and the said Ada Burhans Smith having qualified and given bond as such administratrix, is duly authorized to take upon herself the administration of said estate according to law.

In witness whereof, I hereunto affix the seal of said court and subscribed my name at Elkhart, Indiana, this 29th day of March, 1913.

[SEAL.]

CHAS. A. AITKEN,
Clerk Elkhart Superior Court.

Certificate.

I, Chas. A. Aitken, clerk of the Superior Court within and for the county and state aforesaid, do hereby certify that the above is a full, true and complete copy of the letters of administration issued upon the estate of said decedent, as the same remains of record in my office.

9 In testimony whereof, I hereunto subscribe my name and affix the seal of said court this 16th day of June, 1913.

[SEAL.]

CHAS. A. AITKEN,
Clerk Elkhart Superior Court.

Certificates of Authority.

STATE OF INDIANA,
Elkhart County, ss:

I, James L. Harman, Judge of the Elkhart Superior Court, and of the Probate Department thereof, do hereby certify that Chas. A. Aitken whose signature is above written, is the duly elected, qualified and acting clerk of the Elkhart Circuit and ex-officio clerk of the Elkhart Superior Court of said state; that as such clerk he has the care and custody of the Civil, Criminal, Probate and Common Pleas Records of said Circuit and Superior Courts, and that his certificate above is in due form of law.

Witness my hand and the seal of said court hereto affixed at the City of Elkhart, Indiana, this 16th day of June, 1913.

[SEAL.] JAMES L. HARMAN,
Judge Elkhart Superior Court.

STATE OF INDIANA,
Elkhart County, ss:

I, Chas. A. Aitken, Clerk of the Superior Court within and for said county and state aforesaid, do hereby certify that James L. Harman is the duly elected and acting Judge of the Elkhart Superior Court of the State of Indiana; that as such Judge he is ex-officio Judge of the Elkhart Superior Court, and that his signature above written is genuine.

10 In testimony whereof, I have hereunto affixed my name and the seal of said court at the City of Elkhart, Indiana, this 16th day of June, 1913.

[SEAL.] CHAS. A. AITKEN,
Clerk Elkhart Superior Court."

(Transcript pages 2 to 3.)

J. D. BOWERSOCK, called as a witness in behalf of said appellee, testified in substance as follows:

That he had lived in Lawrence, Kansas, 35 years; that he was the owner of the Lawrence Paper Manufacturing Company; that he knew Sumner I. Smith; that said Smith at the date of his death was receiving, as superintendent of said Lawrence Paper Manufacturing Company, a salary of $1800.00 a year. (Transcript, page 3.)

Dr. ALFRED GIFFORD, called as a witness for said plaintiff, testified in substance as follows:

That on or about the 28th day of November, 1911, he was a physician and surgeon in Lawrence, Kansas, and was called to the paper mill in said city to examine the body of the deceased, Sumner I. Smith; that the apparent cause of the death of said Smith was a severe burn and a crushing of the body (Transcript, page 4.)

ALBERT F. NEUBAUER, also testified, on behalf of said plaintiff, in substance, as follows:

That he had been an employe in said paper mill for about 5 years; that he became acquainted with Sumner I. Smith at said paper mill in Lawrence, Kansas; that he, said witness, worked in the
11 department where the paper machine was located.

"Q. I will ask you to state if they have such a machine known as a squeeze roll?

A. Yes, sir.

Q. And the dryer felt rolls?

A. Yes, sir.

Q. And the dryer rolls?

A. Yes, sir.

Q. Will you describe to the jury the dryer felt roll and the dryer rolls?

A. Well, the dryer felt roll is a roll about eighty inches long by six inches in diameter, and the dryer roll is about seventy-two inches long and about three inches in diameter.

Q. What was the weight of the dryer roll?

A. I should judge it would weigh twelve hundred pounds.

Q. What was the dryer felt roll and the dryer roll used for?

A. To dry the paper.

Q. Can you describe to the jury how the paper came in contact with these two different rolls?

A. Well, the paper, when it came off the second pass roll, where the paper came through before it went into the dryer—the sheet of paper came up this way and right down through the squeeze rolls and down this way (illustrating), between the felt roll and this big dryer roll, and then over to the bottom roll; and it keeps going like that, around and around, until it gets clear out.

Q. Then the dryer roll and the dryer felt roll kind of run together?

A. Yes, sir; they just run that way (illustrating).

Q. Something similar to an ordinary wringer?

A. Like a clothes wringer, yes, sir.

12 Q. They came together in that way?

A. Yes, sir.

Q. About how far apart are the dryer roll and the dryer felt roll?

A. They are usually, I should judge, about four inches; probably a little more, maybe not quite so much.

Q. I will ask you to state if, upon the 28th day of November, 1911, these rolls—the dryer roll and the felt roll—were in any way screened or guarded.

A. No, sir.

Q. Where were these rolls situated with reference to the floor?

A. Well, the bottom one was about even with the floor—if anything, a little bit lower. The dryer felt roll was about three or three and one-half feet up from the floor.

Q. What was the dryer felt roll and the dryer roll up against, or close to?

A. I don't understand you.

Q. Were the rolls apart, away from the press?

A. They were about three feet apart.
Q. About three feet apart?
A. Yes, sir.
Q. What was between the press and the dryer rolls and the dryer felt rolls?
A. Well, there wasn't anything but a board, or a plank, to walk across from one side to the other, under the sheet of paper, where the sheet of paper came over.
Q. That was right between the press, where the paper came off from the press onto the dryer felt and dryer rolls?
A. Yes, sir.
Q. How wide was that board?
A. About eight or ten inches.
13 Q. What was that board placed there for?
A. To walk across on it.
Q. While the machine was in operation?
A. Yes, sir.
Q. So the upper felt roll was above the floor, was it?
A. Yes, sir.
Q. And it was turning in?
A. Yes, sir.
Q. And right on this side was the large dry roll, and that was turning in that way?
A. Yes, sir.
Q. This dry roll would weigh about twelve hundred pounds?
A. I should judge so, yes, sir.
Q. You may state now to the jury if you saw Sumner I. Smith around the day he was killed.
A. I did.
Q. With whom did you see him?
A. Mr. Dinsmore.
Q. Who is Mr. Dinsmore?
A. The assistant manager, at that time.
Q. Where did you see him?
A. I seen Mr. Smith at the west end of the paper mill in the morning first for a little while, and after that I seen him and Mr. Dinsmore standing together at the west end, talking.
Q. Where were they standing, or talking, with reference to the dryer felt roll and the dryer rolls?
A. They were away west of it and they started to walk on down to the east end.
Q. Did you see them near these rolls?
A. Yes, sir.
14 Q. Whereabouts?
A. They were standing at the north side of it, at the east end.
Q. How do these rolls stand—east and west or north and south?
A. East and west.
Q. How long did you see him talking there?
A. Oh, maybe two or three minutes.
Q. Then what did you see?

A. Well, I didn't see anything.
Q. What did you hear?
A. I heard him holler.
Q. When you heard him holler, what did you do?
A. I tried to stop it by pulling the rope.
Q. Pulling the rope for what?
A. To stop the engine, to stop the machine.
Q. Did you stop it?
A. No, sir; I broke the rope.
Q. Did anybody else try to stop it, to your knowledge?
A. Yes, sir.
Q. Who?
A. Mr. Fearing.
Q. Garfield Fearing?
A. Yes, sir.
Q. Did he stop it?
A. No, sir.
Q. How long before the machine was stopped?
A. Well, it was over a minute or two.
Q. Did you go back to the dryer felt roll and dryer rolls?
A. Yes, sir.
Q. What did you observe there?
A. Well, I observed a lot of hot steam and water and things shooting off there, and I walked around to the east end of the machine; and about that time Mr. Fearing was at the dryer rolls there, and commenced shutting the water and steam off.
Q. Did you see Mr. Smith?
A. I did not at that time.
Q. Did you see him immediately afterwards?
A. Yes, I did.
Q. Where was he?
A. He was laying down in the pit.
Q. In the pit?
A. Yes, sir.
Q. Was there a pit below the dryer felt rolls and the dryer rolls?
A. There was, yes, sir.
Q. And he was down in the pit?
A. Yes, sir.
Q. What was the condition at that time of the dryer rolls?
A. Well, it broke the bearings and throwed that clear out of place. It throwed it out of the cogs, one bearing.
Q. Describe to the jury those rolls, and just what the situation was there?
A. The little dryer felt roll had a couple of journals about that long, maybe three-quarters of an inch in diameter that it turned in.

Objected to as incompetent, irrelevant and immaterial.
Objection overruled. Defendant excepts.

Q. Go on?
A. They were about that long, about three-quarters of an inch in diameter, and it run between bearings at each end, and the bearing

on the north side was broke clear off, and the big dryer, the one on the bottom, it just raised that right out of the bearing over the break, and that throwed the dryer clear off out of its place.

Q. Did you assist Mr. Smith, assist in getting Mr. Smith
16 out of that place?

A. No, I didn't; at that time I was too far back; I was going around to get on the other side.

Q. He was taken out of there?

A. Yes, sir.

Q. Did you observe his condition?

A. I did.

Q. State to the jury what his condition was?

A. Well, he was all smashed, his face. I noticed his clothes was all torn, his shirt was tore off, torn at the arms.

Defendant objects to this testimony as calling for incompetent, irrelevant and immaterial testimony.

The Court: As I understand it they admit that this man was killed between those two rollers, and I think admit that he was in the employ of Mr. Bowersock in this mill; I think Mr. Bowersock testified to it. With those admissions it seems to me that all there is to try is the question of guards or screens and the matter of damages. I may be anticipating, but I understand those things are admitted.

Mr. Brownell: I don't think we want to make the admission so broad. As far as this particular question is concerned we admit he was in the employ of Mr. Bowersock.

The Court: Well, if there is any dispute about the admissions I will let him go on.

Q. State to the jury what his condition was?

A. His clothes and shirt sleeves was tore off here, and his face was smashed, and all bloody.

Q. How about his body?

A. I didn't notice anything.

17 Q. Was he dead?

A. Yes, sir.

Q. Now, you may state to the jury if these dryer rolls and dryer felt rolls and squeeze rolls were thereafter guarded and screened?

A. They were.

Q. When?

A. That same night or day; that evening.

Q. How did they guard them?

A. By putting up a plank across and bolting it on so as to keep anybody from getting down in there.

Q. Speak louder; this juror over here can't hear you. Repeat your answer?

A. It was a wooden plank about eight inches wide and two inches thick, with a couple of iron braces on the ends, and they bolted that right up on the drier; it set this way on edge, so as to keep the hands out of there, so nobody could get down in there.

Q. Was that ever guarded prior to the death of Mr. Smith?

A. No, sir.
Q. But it was guarded immediately afterwards?
A. Yes, sir.

Question objected to by defendant as calling for a conclusion and incompetent, irrelevant and immaterial testimony. Objection sustained and answer stricken out. Plaintiff excepts.
The Court: The witness has described what was put there.

Q. By whose instruction or direction was that machinery guarded?

Objected to by defendant as calling for a conclusion.
18 Objection overruled. Defendant excepts.

A. Mr. Dinsmoor.
Q. Who is Mr. Dinsmoor?
A. The assistant manager.
Q. Who prepared the guard for this dryer roll and dryer felt roll?
A. A fellow that used to work there; Nick Stucker.
Q. Who assisted him?
A. He did it himself, and I assisted him put it on that night; he put it himself, and I helped put it on (Transcript pages 6 to 11).

Cross-examination by W. B. Brownell:

Said witness Neubauer, on cross examination testified in substance as follows: That he first saw Mr. Smith and Mr. Dinsmoor about 60 or 70 feet from the place of the accident; that the sheets of paper was carried from one dry roll to the other by hand (Transcript pages 12 to 15).

"By the Court:

Q. You gentlemen have probably seen this machine, but if the jury has as hazy a notion of it as I have I don't think they have a very clear idea of what it looks like, so I want to ask a few questions. These two rolls that you speak of, the dry felt roll and the dry roll, a big one and a little one; are they placed one on top of the other?
A. No, sir; the little roll is on the east side of the big one.
Q. The little roll is on the east side and the big roll on the west side?

A. Yes, sir.
19 Q. About in this position (illustrating)?
A. Yes, sir.

Q. How do those two rolls constitute the machine, or are they a part of the machine?
A. Well, I don't know what you would call them.
Q. Well, are they a part of one big concern that is used to pass the paper through?
A. Yes, sir.
Q. How are the ends fastened?
A. There is a journal in there.
Q. A gudgeon at each end?
A. Yes, sir; a gudgeon; that is what they call them.

Q. And they lay side by side?
A. Yes, sir.
Q. And how high are they above the floor where you walk?
A. The big roll is a little lower than the floor.
Q. A little under the floor?
A. Yes, sir; and the little roll strikes me about here (indicating).
Q. And the top of the big roll strikes a man about where?
A. Well, I should judge about along here.
Q. Is the top of the little roll about as high as the top of the big roll?
A. Just about; yes, sir.
Q. And they each turn in towards each other?
A. Yes, sir.
Q. And these two and gudgeons are fastened into an iron boxing, are they?
A. Yes, sir; just laid into an iron boxing.
Q. Is there any top cap on that iron boxing?
A. No, sir; nothing.
Q. Now anything that goes down between those two rolls, the little one and the big one, where does it come out?
A. It comes right back to the roll, right up on the other side.
Q. Suppose anything should get down in there where would it go; something that is not fastened?
A. It would keep going on out to the west end and fall out.
Q. And does this paper move on the canvas?
A. Yes.
Q. The paper pulp follows the canvas?
A. Yes, sir; the canvas draws it on the bottom, and it goes on through" (Transcript pages 15 to 17).

GARFIELD FEARING testified in behalf of plaintiff in substance as follows:

That he was a laborer in the paper mill.

Q. Were you in the employ of Mr. Bowersock or the paper mill company on the 28th day of November, 1911?
A. Yes, sir.
Q. Did you know Mr. Sumner I. Smith?
A. Yes, sir.
Q. Was he workinng there?
A. Yes, sir.
Q. How long had he been employed there?
A. About five or six months, I guess.
Q. Did you see him together with Mr. Dinsmoor near what was called the squeeze rolls, the dryer felt roll and the dryer rolls upon that day?
A. Yes, sir.
Q. When did you first see them there?
A. As soon as they come in the mill; they come around and were standing there where I generally stood.

21 Q. You may state what you saw and observed at that time until after Mr. Smith was killed?

A. Well, I saw him standing there at the rolls, at the west end of the machine, and he was talking about that, and then he walked to the other end, the east end of the dryer, and they stood there a while and I seen Mr. Smith go in between there and then I heard someone holler, and I tried to pull the rope to shut the engine off, or some of us did, and the rope broke, and we didn't get it shut down right away, and when we got it shut down we went back around there, and he was in under the drier.

Q. What do you mean, the dryer felt roll?

A. Yes; driers we call them.

Q. Where did you observe his body?

A. Laying under the first drier on the east end.

Q. The dryer felt roll and the dry roll, under those?

A. Well, is between the dryer felt and the drier.

Q. The dryer felt roll, as I understand, is a small roll, about six inches in diameter?

A. Yes, sir.

Q. And the drier is a roll about three feet in diameter?

A. Yes, sir.

Q. And they run together?

A. Yes, sir.

Q. Like a clothes wringer?

A. Yes, sir.

Q. How far had his body got in between those two rolls?

A. About up to here (indicating).

Q. Did you take him out of there, or assist in doing it?

A. I helped; I couldn't get him out by myself.

Q. Who aided you in getting him out?

22 A. Why, Nick Sellard and a fellow named Dick Roberts and Charley Davenport, I think.

Q. What was the condition of his body when you got him out?

Objected to by defendant as calling for incompetent, irrelevant and immaterial testimony. Objection overruled. Defendant excepts.

A. Why, his face and head was all over blood and black."

(Transcript pages 22 and 23.)

Q. See if you can describe to the jury these rolls and their position as to the floor, and all about them?

A. Well, the bottom of the drier roll is about level with the floor, but there is a pit underneath it, and the top is about that high from the floor (indicating); then the dryer felt roll—there is two of them, one at the top that runs right along side of it and one at the bottom and the felt goes up under it, and then over and comes down this way (indicating).

Q. Are they on a level, these two felt rolls and the dry roll?

A. No, sir, the drier is higher than the dryer felt roll a little bit; they stand about like that (indicating).

Q. Now the paper which was being manufactured came in from the squeeze rolls located directly above?

A. Above the drier, yes, sir.

Q. And was elevated down on a canvas?

A. No; it just drops down, and after it gets to the canvas that leads it around the drier.

23 Q. It drops down between these two rolls?

A. Yes, sir.

Q. Where does the workman stand with reference to these rolls in order to guide the paper or pulp coming down and guiding it in between these rolls?

A. When it is first started you stand at the north end of it and put it through the squeeze roll, and after you get it started through the rolls you follow it on up the line.

Q. There is a foot board or platform where the workman stands for that purpose, is there not?

A. Yes, sir.

Q. Now was there a plank on the east side of these rolls?

A. Yes, sir.

Q. What was that plank for?

A. It was laid across that pit, to walk across.

Q. Where was that plank—what was the plank between?

A. It was between the second press and the drier.

Q. What is this press for?

A. To press the water out of the sheet.

Q. Out of the paper?

A. Yes, sir.

Q. And that was located how far east of this plank, at that time?

A. The plank—I don't suppose it would be over a foot from the plank; I wouldn't suppose it was over a foot.

Q. How wide was that plank?

A. About ten or twelve inches.

Q. At the east side of the plank what was there, a roll?

A. A felt roll.

24 Q. And then a workman going between the press and these drier felt rolls and drier, would have to walk across on that plank?

A. Yes, sir.

Q. And running along on the east side of the plank was a felt roll?

A. Yes, sir.

Q. What is the office of this felt roll?

A. Why, the felt carries the wet paper; it runs on to a felt until it gets through both presses and the water is all out. When it is first put in it is rough and it is on a screen where you can stretch it out, and when you put it in the different machines you have to keep winding this roll up to make the felt throw it out towards the drier.

Q. And it throws it out toward the plank, too?

A. Yes, sir.

Q. Now at the time Mr. Smith was killed, this press was about a foot to the east of this plank?

A. Yes, sir.

Q. Now you may state to the jury if these two rolls, the drier roll and the drier felt roll run together?

A. Well, they don't touch each other.

Q. Well, they run in the same direction?

A. Yes, they run in that way; they run in opposite directions; they run right in together, that way (illustrating).

Q. You may state to the jury if there were any guards or screens along the dryer felt roll and the dry roll on the 28th of November, 1911, or at the time Mr. Smith was killed?

A. No, sir, there was not.

Q. There was none?

A. No.

Q. Was that afterwards guarded?

A. Yes, sir.

25 Q. When?

A. That night, after supper.

Q. After supper?

A. Yes, sir.

Q. Can you describe to the jury the office of that guard; what was it there for?

A. Why, it was to keep anybody else from falling in.

Q. Or getting their hands in between the rolls?

A. Yes.

Q. Describe it to the jury; can you?

A. Why, it was a plank about a two by eight fastened to the drier—on the frame of the squeeze rolls, one end fastened on this side and one on the other, right above the dryer felt roll.

—. Guarded thus was it possible for anybody to get their hands between the rolls?

Objected to by defendant as calling for incompetent, irrelevant and immaterial testimony. Objection sustained. Plaintiff excepts.

Q. You may state to the jury if the machine run just the same with the guard on, and these rolls performs the same office just as well with the guard on as without it?

A. Yes, sir.

Q. So the guard is a protection to the people who work alongside of it, is it?

Objected to by defendant as leading. Objection sustained. Plaintiff excepts.

Q. Well, state what the guard was for?

Objected to by defendant as repetition. Objection overruled. Defendant excepts.

A. To keep anybody else from getting in there where Mr.

26 Smith did, in between the drier and the felt roll.

Q. Now I believe you stated that at the bottom of the dry roll was a sort of a pit?

A. Yes, it is over a pit.

Q. How deep is this pit?

A. It is about eighteen inches from the bottom of the drier.

Q. And the only covering of the pit between the press and the dryer felt roll and dry rolls, was this plank which you walked across; that was the condition at that time?

A. Yes, sir.

Q. Has it since then been covered?

A. Yes, sir.

Q. When?

Objected to by defendant as calling for incompetent, irrelevant and immaterial testimony, relating to something occurring after the accident, and there being no allegation in the petition relating to the floor or the plank, and no allegation of negligence in that respect. Objection sustained, plaintiff excepts.

(Transcript pages 24 to 27.)

JOHN SOUDERS testified on behalf of plaintiff, in substance, as follows:

That he was a helper on one of the machines in the paper mill and became acquainted with Sumner I. Smith, in Lawrence, Kansas, at the paper mill in 1911; that he was not working the night when said Smith met with his death.

"Q. Just describe those rolls to the jury; the dryer felt rolls and the dry rolls?

A. Well, the dry rolls are very large rolls; they are about
27 three feet in diameter, and the felt roll—I don't know—about four inches I guess, in diameter, and the felt roll runs in—it sets east of the dry roll and runs this way, and the dry roll turns this way so they run together; they run towards each other.

Q. How long are those rolls?

A. Well, the felt roll is supposed to be about eighty-one inches, and the dry roll, I think about seventy-four inches; of course, I never measured them.

Q. How high does the top of this dry roll stand from the floor?

A. Well, it is about three and a half or four feet.

Q. So it would strike a man about here?

A. It would strike him about the chest, the top would.

Q. The dryer felt rolls—the east end of the dry rolls and dryer felt rolls—what is the next machine east of them?

A. The second press.

Q. How far is that press from these rolls?

A. Well, about two and a half or three feet.

(By the Court:)

Q. Can't you speak loud enough for those men to hear you?

A. Yes; I can holler if you want me to.

Q. Talk up so that farthest man can hear you. About how wide is that space, or about what distance did you say the press was from these rolls?

A. It is between two and a half and three feet I judge; I never measured it.

Q. And in passing between the press and the roll, what do you pass over on?

—. A plank.

28 Q. What is that *that* plank over?

A. A pit.

Q. How wide is that plank?

A. About ten inches.

Q. What are the duties of the man working on that machine in regard to putting the paper in; how do you do that?

A. How do you put it in?

Q. Yes?

A. Why, you put it in with your hand.

Q Where do you stand when you put it in?

A. At first, when you first handle it with your hand you take it off the wet felt—the wet felt carries it from the first press to the second press, and when it gets started in the second press, it come back this way (indicating), and you catch it and carry it over with your hand on to the drier, if it happens to break.

Q. You do that only when you have a broken end of a sheet of paper?

A. Yes, sir.

Q. If the machine is running all right you don't have to touch the paper, do you?

A. No, sir, not at all when it is running all right.

Q. It is only when it breaks that you have to do that?

A. Yes.

Q. Now this system of rolls, how long do they extend east and west?

A. You mean the whole machine?

Q. Yes, the whole machine?

A. Oh, I guess about seventy feet.

Q. When you are tending the paper along this system of rolls, what do you stand on?

A. You go along the running board, a foot board that is there.

Q. You have a running board the full length of that machine or system of rolls?

A. Yes, sir.

29 Q. And when the paper breaks in places on that machine, you stand on that running board and direct it through, do you?

A. Yes, sir.

Q. At the time that Mr. Smith was injured, or killed, was there anything the matter with those squeeze rolls, or were they running all right?

Objected to by defendant as incompetent, irrelevant and immaterial. Objection sustained. Plaintiff excepts.

The Court: I think I will sustain this objection as immaterial. The plaintiff is standing squarely on this factory act, and is asking no relief under any common law liability. Is that correct?

Mr. Bishop: Yes, sir.
The Court: The objection is sustained then.

Q. You stated, I believe, that you worked there the night of the 27th of November?
A. Yes, sir.
Q. What time did you quit work?
A. Seven in morning.
Q. Seven o'clock the next morning?
A. Yes, sir.
Q. Was there any guard over these rolls or attached to these rolls when you quit work on the morning of the 28th?
A. No.
Q. When did you go back to work?
A. I went back on the night of the 29th.
Q. The night of the 29th. You didn't go back the night of the 28th?
A. No.
Q. Was the machine in operation on the night of the 28th?
A. No, sir.
30 Q. When you went back to work on the night of the 29th, was there guard on this machine?
A. There was.
Q. What kind of a guard was that, how was it attached?
A. Just a plank, a two by eight plank set up on edge right over the dryer felt roll, bolted at each end to the frame; it was up on edge right over the roll.
Q. What was it set there for?

Objected to by defendant as calling for a conclusion, incompetent, irrelevant and immaterial. Objection sustained. Plaintiff excepts. Witness dismissed."

(Transcript pages 33 to 35.)

RUTH G. SICKLES testified on behalf of plaintiff in substance as follows:

That she lived in Lawrence, Kansas, for about two years.

"Q. Were you acquainted with Sumner I. Smith and his wife, Ada Burhans Smith?
A. I was.
Q. Where did they live with reference to your residence?
A. Next door to us; we were practically in the same yard.
Q. The next door south of you, was it?
A. Yes, sir.
Q. How long did you live neighbor to them?
A. About five months.
Q. While you lived neighbor to Mr. and Mrs. Smith, did you have occasion to observe their domestic life?
A. Yes, sir.
31 Q. Did you visit at their house, or call on them?
A. I did.
Q. Were you personally acquainted with Mr. Smith?

A. I was.
Q. Did you ever see Mr. and Mrs. Smith together in the home?
A. Very frequently.
Q. What was their attitude towards each other?
A. It was always very kind and affectionate.
Q. Were they kind and affectionate at all times?
A. Why, so far as I ever knew or saw.
Q. From your observation then you would say that their domestic life was a happy one?
A. Yes, sir; I would."

(Transcript page 37.)

CHARLES S. BURHANS testified on behalf of plaintiff in substance as follows:
That he was the father of Mrs. Smith, and knew her husband Sumner I. Smith.
"Q. Did you observe or have a chance to observe the treatment he gave your daughter, after they were married?
A. I visited them several times.
Q. How frequently did you visit them?
A. Oh, quite frequently. I visited them three or four times while they were living in Milwaukee, and they were at my home a great deal, and I visited them while they were living here.
Q. What was his treatment towards your daughter?
A. Very affectionate; I never saw him any other way.
32 Q. Do you know anything about his habits?
A. In what way?
Q. As to being a temperate and sober man, and industrious?
A. He was very temperate; I never knew him to be otherwise.
Q. How about his industry?
A. He was very industrious.
Q. Do you know the amount of wages he received while in charge of this business at Milwaukee?
A. I do not; I think though it was $125.00 or $150.00 I am not sure which.

Witness dismissed."
(Transcript page 38.)

ADA BURHANS SMITH testified in substance as follows:
That she was the wife of Sumner I. Smith.
"Q. When were you married, Mrs. Smith?
A. June 29th, 1909.
Q. Where did you live prior to coming to Kansas?
A. We went directly to Milwaukee after being married, and then came here.
Q. Prior to your marriage, your home was where?
A. At Elkhart, Indiana.
Q. What was your husband's business before he went to Milwaukee?

A. He was in charge of his father's paper mill before we were married, until a short time before we were married, when he accepted a position at Milwaukee, with the Jones, Mandeville Company.

Q. What business was that; what was he doing for that
33 company?

A. He was superintendent of construction for the Jones, Mandeville Company, and the placing of the machinery in the mill for their buildings.

Q. How long was he employed there?

A. Well, before we were married a short time; from a short time before we were married, until just before we came here in 1911, June, 1911.

Q. What were your husband's qualification as to education?

A. Well, he had received an unusually good education. Instead of going the senior year in high school—he went through the high school except the senior year, and instead of going through the senior year, he took a preparatory course at Worcester, Massachusetts. That was to prepare him for the Boston School of Technology, and he graduated there in 1907.

Q. How many years was he in the Boston School of Technology?

A. I think it was four years, if I am not mistaken.

Q. Can you tell the jury what kind of a school that is?

A. Well, it is a school of mechanical engineering and electrical engineering. A man that has a diploma from the Boston School of Technology is considered fit for almost any kind of a mechanical or electrical engineering position.

Q. What was the age of your husband at the time of his death?

A. He was thirty-three; he would be thirty-four in a little over a week.

Q. When did you move to the City of Lawrence?

A. Mr. Smith came—I think it was about the 3rd of May,
34 and I came as soon as our goods arrived here, which was about the 4th of June, 1911.

Q. What were his habits as to being temperate man?

A. He was very temperate.

Q. What were his habits as to being industrious?

A. Well, I think he was very industrious, unusually industrious.

Q. Was your home life happy?

A. Indeed it was; I never can remember a cross word.

Q. Was his treatment of you kind?

A. I couldn't ask for better.

Q. Affectionate?

A. Yes, sir; very.

Q. What wages did your husband get at Milwaukee?

A. In Milwaukee, $125.00 a month.

Q. What wages did he get while working for Mr. Bowersock?

A. $150.00 a month.

Witness dismissed."

(Transcript pages 39 and 40.)

Plaintiff introduced in evidence the American Mortality Tables showing the expectancy of life of the deceased, Sumner I. Smith, at 34 years of age to be 32½ years, and then rested her case.

(Transcript page 40.)

The foregoing was all the evidence introduced in chief by plaintiff having any bearing on the manner in which Sumner I. Smith met with his death; and as to his residence; and as to the appointment of Ada Burhans Smith as administratrix by the court in Indiana.

35 *Demurrer to Evidence.*

Defendant then filed a demurrer to the evidence introduced on behalf of said plaintiff alleging that said evidence did not prove facts sufficient to constitute a cause of action against said defendant in favor of said plaintiff, which demurrer, omitting caption, reads as follows:

"Comes now the defendant, J. D. Bowersock, and demurs to the evidence of the plaintiff introduced herein on the trial, for the reason that the evidence introduced by the plaintiff herein does not show and constitute a cause of action in favor of the plaintiff herein and against the defendant.

McCABE MOORE AND
W. B. BROWNELL,
Attorneys for Defendant."

Which demurrer was overruled by the court and excepted to by defendant.

(Transcript page 41.)

Upon the presentation to the court of said demurrer to the evidence the following proceedings took place, to-wit:

"The Court: The way the evidence stands now these people were apparently residents of Lawrence. This appointment says 'Late of Douglas County, Kansas.' Query: Can a person late of Douglas County, Kansas be a resident of Indiana, and have his estate administered there?

Mr. Moore: We are not arguing a proposition of that kind, but we don't wish to waive it.

36 The demurrer was then argued by counsel and the court after hearing the argument overruled said demurrer, to which ruling the defendant excepted."

(Transcript page 42.)

And thereupon said defendant introduced the following testimony:

J. D. BOWERSOCK, testified in substance as follows:

That Sumner I. Smith was superintendent of the paper mill, located on the south side of the railroad track in Lawrence, Kansas,

where he died; that the duties of said Smith were "to make paper; to look after the men and the affairs of the mill; to look after the quality and quantity of the paper put out, look after the machinery, and generally to look after the mill, to superintend the plant, and to have direct control of the paper manufacturing on the south side of the track"; that said Smith was superintendent when he died and was to "look after the machinery and safeguard it" when it was deemed necessary (Transcript, pages 43 & 44).

That he authorized Mr. Hill to make the arrangements with Mr. Smith by which said Smith became superintendent of the paper mill (Transcript, page 45).

Cross-examination:

"Q. You had the sole management of that concern, didn't you, Mr. Bowersock?

A. Well, I would say that that question would call for some explanation. There is a sense in which I can answer that question 'Yes, along certain lines'; but as to the details of all that business, I was not. I am not called in for every detail that may come up there.

37

Q. But as a matter of fact, you are and were the sole owner and manager of that paper manufacturing concern?

A. In the sense that I can control it, I presume that is a fair statement.

Q. And in the employment of every person in that paper manufacturing establishment you reserve the right to direct his movements, do you not?

A. I don't think that is fully correct.

Q. That is substantially correct, is it not?

A. I have men there to look after details, and I have the utmost confidence in them, and I would not except I came in direct contact with a man that was doing something he ought not to do, I would not take the responsibility of discharging him.

Q. If you entered that establishment, and observed some person doing a thing that did not meet your approbation, you would not have to call upon anybody else to discharge him if you so desired, would you?

A. I don't think it would be necessary for me to call upon anyone else if I desired to discharge him.

Q. You would have that right today?

A. Yes.

Q. And in the construction of that mill you took the thing up in detail yourself, did you not?

A. No.

Q. Like you do with all the other buildings that belong to you?

A. No, not in detail; and if you refer to little repairs that were only taken up with me generally, not in detail; only very generally.

38

Q. Do you not, and did you not, have the plans and specifications presented to you in the repairing of the mill, and the extension of the same?

A. Oh, at times I may have seen the blue prints; I cannot say positively that I have; I may have in one instance seen one blue print with reference to some special thing that was required.

Q. And after the plans and specifications had been presented to you you approved them?

A. If I didn't disapprove them. If my managers were recommending them they would stand approved; I don't know that there was any formal approval of them.

Q. Who is manager outside of yourself?

A. Mr. Hill.

Q. What position does he occupy?

A. Manager of the business.

Q. And what position does Mr. Dinsmoor occupy down there?

A. We call him an assistant manager to Mr. Hill.

Q. But you are first of all, the manager and proprietor, with power to direct and regulate the manufacture of paper and all the details of the business, everything down there, are you not?

A. No, you make that too broad; as to details and the manufacture of the paper; I probably may be said to have nothing to do with it.

Q. And Mr. Hill was next to you, wasn't he?

A. He was and is.

Q. And Mr. Dinsmoor was next to him?

A. He was so regarded.

39 Q. And all persons employed in that establishment, as to the running of it, as to the employment of men, and as to the details of the machinery were directly under these men, weren't they?

A. No, not as broadly as you put it. I look more to the superintendent of the mill to look after the details of paper making and paper machinery, and the care of the paper machinery than I do to both of these other men combined. I don't regard either one of those men as paper makers" (Transcript, pages 46 and 47).

IRVING S. HILL, testified in substance as follows:

That, for the purpose of interviewing Mr. Smith relative to his becoming superintendent of the paper mill in Lawrence, Kansas, he met Mr. Smith in Chicago, where "it was agreed at that time that it was better for Mr. Smith to come to Lawrence and look over the plant, and then to have another talk and settle definitely as to his employment. He (Smith) later came to Lawrence—examined the plant and accepted the position"; that the duties of Smith were: "that he (Smith) should have charge of the men, the right to employ and discharge men, to have charge of the operation of the machinery and its ordinary alteration and repair, the safeguarding of machinery, fire protection, and the entire charge of the mill, with the exception of improvements involving the expenditure of additional money for new machinery" (Transcript, pages 50 and 51).

"Q. State whether or not, Mr. Hill, at any time during
40 your employment of Mr. Smith you had any conversation with him when Mr. Dinsmoor was present in regard to putting guards around the machinery?

Objected to by plaintiff as incompetent, irrelevant and immaterial. Objection overruled. Plaintiff excepts.

A. Such a conversation was had.

Q. About when?

A. I would say early in the fall; I couldn't locate the time. It was during the overhauling of the machinery and changing of it prior to starting it in operation again. Mr. Dinsmoor and myself were going through the mill looking things over. The machines were unguarded, and were being what we call "turned over," they had been sitting in their places some time, and were being turned over to see if they were in alignment and in order. They did not have guards on then. We then had a conversation with Mr. Smith, and some discussion in regard to it. He desired to get the entire mill in operation before putting on guards and we dissented with him and desired that he put on the guards while the mill was down.

Q. You had a talk there about putting on guards?

A. Yes.

Q. You were talking over the matter of guarding the machinery?

A. Yes.

Q. Was he directed to put the guards on the machinery?

A. We made our wishes known to him that he should put on guards.

Cross-examination:

Q. Why did you allow that establishment to be operated
41 without the machinery being guarded—you were the manager?

A. The place- that were known to me were guarded.

Q. The places that were known to you were guarded?

A. Yes.

Q. You had the power as manager of that establishment to have the machinery guarded before the mill went into operation, didn't you?

A. The authority, perhaps, yes; but the procedure in the business is that the superintendent hired to operate the mill shall have charge of it.

Q. I don't care anything about that. You had knowledge that the machinery was unguarded and yet you permitted the mill to run, didn't you?

A. I just stated to you that the places within my knowledge were guarded, the places within my knowledge that were dangerous were guarded before it started.

Q. You knew all about the squeeze rolls and the dry felt rolls and the dryer rolls, didn't you?

A. It was my experience that those places were not considered dangerous; a number of mills that I have been in that place was not guarded.

Q. I am not asking you anything about the danger of it. These dryer rolls and felt rolls were not guarded, were they?

A. They were not guarded.

Q. And these two rolls run together, do they not?
A. The operation of the rolls has been described here.
Q. You know that to be a fact?
A. The two rolls turn in, yes.
Q. You had observed that a great many times had you not?
A. Yes, sir.
42 Q. Isn't that true, while they are in operation they run together?
A. Yes, sir.
Q. And you know that along the east side of the dryer felt roll was a narrow plank, didn't you?

Objected to as incompetent, irrelevant and immaterial and not within the issues made by the pleadings.
Objection overruled. Defendant excepts.

A. I would not feel competent to describe the condition that was in.
Q. You knew about this particular plank, did you not?
A. I wouldn't say I did.
Q. You knew that a part of the floor over the pit underneath the dryer rolls and the felt rolls was open, with just a narrow plank over it?

Objected to by defendant as incompetent, irrelevant and immaterial, there being no allegation of negligence in that regard. Objection overruled. Defendant excepts.

A. I wouldn't undertake to describe the conditions. Mr. Dinsmoor is here, and he was more familiar with it than I was.
Q. And you knew that the men in order to go along the east side of those dryer felt rolls and dryer rolls, which run together, had to pass along on that narrow plank?

Objected to by defendant as incompetent, irrelevant and immaterial under the issues made by the pleadings in this case. Objection overruled. Defendant excepts.

43 A. I knew in the operation of paper machines it was necessary for the men to go in between the wet and the dry ends of the machine.
Q. And you know that directly after the accident, or shortly after the accident when Mr. Smith was killed, the dryer felt rolls and the dryer rolls were guarded?

Objected to by defendant as incompetent, irrelevant and immaterial. Objection sustained. Plaintiff excepts.
The Court: I think it is immaterial whether he knew it afterwards or not.

Q. You did, as manager of that establishment, cause those two rolls I have mentioned in my previous question to be guarded shortly after Mr. Smith was killed, did you not?

Objected to by defendant as incompetent, irrelevant and immaterial. Objection overruled. Defendant excepts.

A. I did not; I was out of town.

Witness dismissed" (Trans. 52 to 55.)

PAUL DINSMOOR, in behalf of defendant testified in substance as follows:

That he was assistant manager of the Lawrence Paper Mill; that he became acquainted with Mr. Smith in the spring of 1911 when Mr. Smith came to Lawrence to become superintendent of the paper mill, at which time, "It was stated to Mr. Smith that we thought it was advisable, and that probably he would also desire to come out here and see the mill, and see the machinery and equipment, and everything about it, in order to determine whether he wanted
44 to take charge of it, and that he was going to take charge of. Mr. Hill had had an interview with him, and it was thought as well that we both talk with him in regard to the matter. We talked over all the matters very fully, and the compensation was arranged for during our interview. During the conversation Mr. Smith stated that if he was going to take charge of the mill he wanted to have charge of it; he didn't want it to be a case of there being three or four bosses on the same matter; that if he took charge of it he must have charge of the mill, of the man and of the machinery, if he was going to act as superintendent. Mr. Hill stated then that I had better enumerate to him what we would expect him to do, and I stated to him that he would have full charge of the grounds, the building, the machinery and the men, with authority to hire and discharge men, and to run the plant generally as if — were the owner; that this included all the methods of manufacture of the paper, the care of the machinery, the safeguarding of the machinery, the location and care of the fire fighting apparatus, in short, that he was to be in full charge of the plant; that at any time he was free to consult Mr. Hill or myself in regard to any matter in which he was in doubt; but that the operation of the mill was entirely in his charge.

Q. Was there anything further said, any details as to any other matter, such as the guarding of machinery?

A. At that time I believe the only thing said in regard to guards was simply the general proposition that he was to place safe-
45 guards at any point at any time where they could be put without interfering with the operations of the machines.

Q. Did you have any other conversation with him at any time in regard to guards?

A. Several.

Q. Will you state them?

Objected to by plaintiff as incompetent, irrelevant and immaterial. Objection overruled. Plaintiff excepts.

A. To go back just a little: When Mr. Smith came here the mill was in operation, and he operated the mill a short time until the summer came, when it was shut down for a general overhauling and making of improvements. In order to make the improvements it was necessary that they should first be laid out on paper, and

during the time that those sketches were being made and drawings were being made, Mr. Smith several times stated that he wanted to do the construction work before the guards were put on, as the statement had been made by us and reiterated, that we wanted the machinery guarded. I stated to him, I can't say how many times, but several, that wherever it was possible to put in any safety appliance without interfering with the operation of the machinery we wanted them put in.

Q. Who laid out the plan for the repairs of the machinery?

A. The original plan for changing the machinery was made by a consulting engineer of the name of James Carey, but that plan was altered by Mr. Smith.

46 Q. Now, who drew the plans?

A. You mean the original plans?

A. Well, the second plans?

A. Mr. Smith, I believe was in the employ of Mr. Carey at the time he entered our employ and I think made some of the drawings, he altered the plans somewhat.

Q. To refresh your recollection; did Mr. Broderick draw any plans?

A. He made all the drawings with the exception of a few minor plans that Mr. Smith drew himself. Mr. Smith didn't have time to do the actual drawing, and so Mr. Broderick, young mechanical engineer from the University made the drawings.

Q. Are you a practical paper maker yourself?

A. I am not.

Q. You may state whether or not at any time Mr. Smith put up any notices in the mill?

A. He did.

Q. I will ask you to examine the placard I now hand you beginning with the word "Caution," and state whether or not Mr. Smith put up that warning in the mill?

A. He did.

Q. Was this up in the mill at the time Mr. Smith was killed?

A. It was. I think there were four copies of it made and put up about a week before he was killed.

Placard identified by the witness is now offered in evidence by defendant, marked Exhibit C, and read to the jury, as follows:

47 *Caution.*

Every Employe is Urged to be Careful in Order to Avoid Accidents.

If there is any machinery, dangerous place or tool that you think should be safeguarded, repaired or improved, we will regard it a favor if you will report same at once to the office. It is desired that all employes assist in reducing accidents to the lowest possible point.

November, 1911.

BOWERSOCK MILL & POWER CO.
LAWRENCE PAPER MFG. CO.
LAWRENCE IRON WORKS.
GRIFFIN ICE CO.

Cross-examination by Mr. S. D. Bishop, Attorney for Plaintiff:

Q. Mr. Smith had nothing whatever to do with the Bowersock Mill & Paper Company?
A. Nothing.
Q. Nor the Lawrence Iron Works?
A. Nothing.
Q. Nor the Griffin Ice Company?
A. Nothing.
Q. Do you mean to say that Mr. Smith prepared these placards?
A. No; he did not.
Q. Who prepared them?
A. I think Mr. Bowersock.
Q. Mr. Bowersock himself prepared these notices?
A. I think so.
Q. And handed them to Mr. Smith?
A. I think they were sent to the office; I think notices for both sides of the track—the corrugating paper box factory and the paper mill; I think that all of those notices for the paper mill were sent to the office, and given to the superintendent of the paper
48 mill by me, and also to the superintendent of the box factory"

(Transcript pages 55 to 59).

"Q. When you told Mr. Smith of the different things he was to have charge of, do you mean to say to this jury, that you as assistant manager relieved yourself of all power and responsibility in doing so?
A. So far as the operation of the mill was concerned, the superintendent has absolute control.
Q. Then if you were to go out into that mill, you mean to say that as assistant manager of The Lawrence Paper Manufacturing Company, if you saw things going wrong there that you would not have power to correct them?
A. I didn't say so.
Q. Well, would you?
A. Certainly I would, but it would depend upon what kind of a thing it was.
Q. Then if you saw machinery that was not guarded as required by the laws of this state for the safety of employes, you would have the power to say to Mr. Smith that you wanted him to guard that machine, wouldn't you?
A. I am not presumed to know where those guards belong, it isn't my line.
Q. Wouldn't you have the power to say to him 'This machinery must be guarded?'
A. Certainly, but so far as locating where the guards belong, that is the mechanic's end of it.
Q. If you ordered that and he failed or neglected to do it, you would have power to discharge him?
A. I would." (Transcript page 60).
49 Q. You stated that if you saw anything wrong there you had the power to have him fix it, or to discharge him if he didn't do it?

A. If there came up a question of power as to the operation of the mill, his word, his opinion would go against mine every time.

Q. You wouldn't have nothing to do with it?

A. Not if he said it was practical or proper; his ruling would be preferred.

Q. If you knew his advice would be wrong, would you say that his word would go?

A. I am not a paper maker; he was hired for that purpose.

Q. Answer my question?

A. I am endeavoring to.

Q. (Question read)?

A. That is my answer. You wanted to know if in my opinion something was wrong I had the power to do what I thought proper, and I stated to you that I was not a practical paper maker, and my opinion would not govern as against his.

Q. Well, if you don't want to answer it, we will let it pass.

A. I have no objection to answering, but I don't want to say something that is not the fact.

(Witness dismissed)" (Transcript page 64).

WILLIAM O'BRIEN, in behalf of defendant testified in substance as follows:

That he was then superintendent of defendant's paper mill; that he has been engaged in the paper mill business for 27 years; that he had been superintendent of such plants in different cities; that paper mills are built on the same general plan (Transcript
50 page 65); that in carrying the paper from the press to the dryer rolls a man goes in between the two portions of the machine, and carries the sheet with his hand to the dryer rolls, or tears it off as may be required; the man stands on the foot board which is 18 or 20 inches above the floor, takes hold of the tail end of the sheet, and carriers it over and lays it on the felt and guides it; that it is necessary that the machine be open so that the man (machine tender) can see where he is placing his hand when he carriers the paper and that the man can see better than he can feel (Transcript page 69).

Q. Now, have you ever seen a machine, a paper machine, in all your experience, that had a plank ten inches in width above the felt roll, at the place indicated where this accident occurred?

A. No, I never did.

Q. Is it practicable or feasible to place a plank at the point indicated by X on this map?

A. I never saw any place where you could put a plank of that kind without it being in the way." (Transcript page 69).

Cross-examination:

Referring to a board (called a guard) placed on the machine after the death of said Sumner I. Smith, attorney for plaintiff, S. D. Bishop, inquired of the witness as follows:

"Q. If it destroyed the efficiency of the machine, and wasn't practicable to operate it, you as a superintendent of thirty-five years' experience would have removed it, wouldn't you?

A. I would take it away anyway if I was running the machine; it is in the way.

51 Q. You mean to say, do you, that if a workman under you would take that guard rail away you would permit it?

A. Why, sure.

Q. You would; and you would allow the workman to go in there between the press and the machine without any protection whatever?

A. Well, I never heard of anybody getting hurt until this affair, and I pass through there a dozen times a day.

(Transcript page 74).

J. F. Ellsworth, on behalf of the defendant testified in substance as follows:

That he lived in Independence, Kansas; had been in the business of manufacturing paper for about 40 years; that he had erected paper mills, operated the machinery and had acted as superintendent of paper mills in Iowa and in Illinois, and operated a mill in Independence, Kansas.

(Transcript page 76).

Referring to the place on the machine where Sumner I. Smith, was injured witness was asked to —

"Q. State what would be the effect of putting a plank eight inches wide across the machine at that point?

A. Well, it would bother most machine tenders.

Q. Have you ever seen in your experience a machine with a plank across there at that point, or a guard at that point?

A. No, sir; never until I saw it on this machine down here.

Q. State whether or not a guard there at that point is practicable or efficient?

A. Well, it is my opinion that it would bother the

52 machine tender.

Q. State whether or not it would increase the danger to the operator at that point in having to run it?

A. If I was running the machine I would rather have it off; I would rather not have it on there. I don't know whether I could do it better, but if I was a machine tender I would rather not have it.

Q. State whether or not it is necessary at all points where the machine tender is obliged to reach in and feed the paper, that it should be open, so that he can see?

A. Oh, yes; all those spaces between the driers have to be; it wouldn't do to obstruct the view so that you couldn't see where you were putting your hand, because the paper comes to a small point where you apply it to the felt roll, and it is very necessary that you see it." (Transcript pages 78 and 79).

Cross-examination:

"Q. Well, you were called upon as a paper manufacturer, as an expert paper manufacturer and builder of machinery to come here for the purpose of testifying that that guard rail wasn't any protection to a workman, isn't that true?

A. The guard rail was not mentioned, nothing was said about it; I was called here just to tell what I know about paper machinery.

Q. Your attention was particularly called to this guard rail in front of the dryer roll and dryer felt roll, wasn't it?

A. Yes, sir.

Q. And you looked at it; you were shown that rail and you examined it?

A. I was shown exactly the place where Mr. Smith was hurt.

53 Q. It is a board about eight inches wide, and about how long—seventy-two inches long?

A. Yes, sir.

Q. And bolted on?

A. Yes, sir.

Q. And made there so secure that a workman falling against it would be protected?

A. I think not; I think it wouldn't protect him.

Q. As I understand, the railing at the end is fastened with bolts?

A. I believe it is bolted on.

(By Mr. Brownell:)

Q. Mr. Ellsworth, when the machinery is being operated, and the paper goes into these rolls, state if it is necessary for the machine tender or machine man to put his hand in there and if this board would increase the danger?

A. In my estimation it would increase the danger of his getting his hand in there.

Q. In your estimation?

A. Yes, sir.

Q. You never tried it?

A. No; I don't want to; I wouldn't want to try it.

Q. You never tried it?

A. No.

Q. And you just look at it from the superintendent point of view?

A. Well, I look at it from the builder's view.

Q. And generally the builder's view is based upon the economy of the machine and not upon the protection of the laborer, isn't it?

A. Well, I reversed that process; I built my machinery and mills with the view of protecting the laborer, the man that does the work, and in all my years of experience I have never had an accident where a man even lost a limb.

54 Q. This mill that you examined yesterday is different from your mill, different from those that you have built?

A. In a very small degree. Paper machinery is pretty much

alike; the same line of paper mills are all very similar; you can't change them very much except in small details.

Q. But the fact that a man was crushed between those rolls and killed would indicate to you that proper precaution had not been taken wouldn't it?

A. Well, there is a hundred places along a machine where a man could get killed.

Q. From the fact that you never had anyone killed, and the fact that there was a person killed here would indicate to your mind that proper precautions had not been taken, would it not?

Objected to by defendant as being a question for the jury. Objection sustained. Plaintiff excepts.

A. I don't see how you could protect it entirely.

(Transcript pages 81 to 83).

ROBERT CLARK testified on behalf of the defendant, substantially as follows:

That he resided in Lawrence, Kansas, a number of years prior to 1903 where he was engaged in the business of manufacturing paper; that he was at one time manager of the Lawrence Paper Manufacturing Company; that he had experience in the paper mill business in other states; that all paper mills are on the same general plan; that there has never been any machinery made that does away with the necessity of the tender, or the machine operator, carrying the paper by hand at certain places on the machine (Transcript pages 86 and 87); that it is necessary at the places where the paper is carried by hand that those places should be open, so that the operator can see where he is placing his hand; that when he operated the paper mill in question in Lawrence, Kansas, he did not consider it practical to put a plank, or guard, at the point in question (Transcript page 88).

55

Cross-examination.

Referring to the plank, or guard, placed above the dryer felt roll, after the accident to Sumner I. Smith, attorney for plaintiff cross examined the witness as follows:

"Q. I think you made the statement that it would destroy the efficiency of the machine in your judgment. Suppose it had been operated successfully from the 29th day of November, 1911, to the present time, and its efficiency had not been impaired; would you say you were mistaken or otherwise?

A. I can't answer that directly, Mr. Bishop, for I don't just know your viewpoint. If you mean its efficiency on account of the prevention of accidents that is one thing.

Q. I mean for operating it as a manufacturing machine; that is what I mean?

A. I think it would be in the way; I think it would be a hindrance to the tender and his helper.

Q. But not the efficiency of the machine?
A. Well, it is the same thing.
Q. No, it isn't. I am speaking of the efficiency of the
56 machine?
A. Well, if you can't take it over quickly—if it hinders the operator from taking the paper over quickly, it hinders the machine: you lose too much paper. It loses time.
Q. How much time would it delay the tender?
A. I don't know.
Q. Would it not make the operator more careful, or the tender more careful, for the reason that he would not be putting his hand down so far as to get it caught between the rolls?
A. I think it would make him more careless in a way. When he starts it down in there he can't see where it is going, and he is more liable to get caught I would think.
Q. Wouldn't you say under those circumstances that the operator would be more careful? In other words, in order to explain my position, a man working in the dark is generally more careful than when working in the light.

Objected to by defendant as an argument. Objection overruled Defendant excepts.

A. Well, Mr. Bishop, I would say that having that plank there it would be very necessary for him to put one hand on the plank, and with the other hand he would put the paper in; now my judgment is he would become very careless with that plank on there.
Q. That is more than an unreasonable suggestion, isn't it?
A. No, I think not. If that was a proper guard I think it would have been on paper machines years ago."
(Transcript pages 92 and 93.)

57 EDWARD MALONE, testified on behalf of defendant, in substance as follows:
That he was then living in Lawrence, Kansas, operating a paper machine in defendant's plant, and handled and dried the paper; that he had been engaged in the business of manufacturing paper in different cities for twenty-five years and was what is know as a machine tender; that he starts the machine to turn on the paper pulp; that when the paper comes through the press, it is necessary for him to take the paper in his hands and carry it to the press rolls by hand, and the paper then goes through the squeeze rolls; that he stands in front of the rolls; that it is necessary for him or his helper, to take hold of the paper by hand as it goes down between the felt roll and the drier; that it is necessary for to have a clear and unobstructed view of the paper when he places it between the felt roll and the drier; that in all his experience he had never seen a plank (or guard) above the felt roll such as was placed on the machine in defendant's paper mill after Mr. Smith was injured, at the point where Smith received his injury; that such a plank, or guard, was not efficient or

practicable and that such a plank or guard would be more injurious than not to have it there, as it would prevent him seeing his hands.

(Transcript pages 94 to 99.)

Cross-examination:

"Q. Now in regard to that guard—that is still on that machine isn't it?

A. Yes, sir.

58 Q. Taking it at this point (indicating on plat), how does that plank stand?

A. The bottom of it is about two inches from the top of this roll.

Q. Does it stand perpendicular?

A. Yes, sir.

Q. In bringing that paper down to make that connection—well, is the top of the dry roll above the plank, or is the bottom of the plank above the dry roll?

A. Well, the bottom of this plank is about two inches above the felt roll, and this felt roll is between three and four inches from the dryer roll. This dry roll is thirty-six inches in diameter.

Q. Well, the light can shine between the plank and the felt roll?

A. Yes, sir.

Q. Now all that is necessary for you to do in order to bring the paper down is simply to bring it down even so that it will go between those rolls, is it not?

A. Yes, sir.

Q. And there isn't any necessity for an operator to get his hand down below the felt roll, is there?

A. Not without he would have an accident and slip and fall; that is the only way I see he could have got caught.

Q. That is the only way you see he could have got caught?

A. Yes, sir.

Q. If he did slip and fall, could he get caught with the plank as it is now?

Objection to as speculation and not proper cross examination, incompetent, irrelevant and immaterial, and not alleged in the pleadings. Objection overruled. Defendant excepts.

59 A. Yes, sir.

Q. Would he be so liable to get caught?

Objected to by defendant as incompetent, irrelevant and immaterial, not proper cross examination, and not within the issues of this case. Objection overruled. Defendant excepts.

A. Well, it would depend on the way he was standing, which way he was standing. You spoke about going down stairs and catching hold of a banisters; if you were on the wrong side of the stairs you could fall, over on the other side you couldn't catch this here.

Q. How high is that guard from the platform?

A. I don't know the driers, are supposed to be three feet, and the top of this board is somewhere near the top of that drier."

(Transcript pages 101 and 102.)

C. E. LINDLEY, testified on behalf of defendant:

That he was then probate judge of Douglas County, Kansas, and that there had not been any letters of administration taken out or issued in Douglas County, Kansas, on the estate of Sumner I. Smith, deceased.

(Transcript page 103.)

G. H. RODERICK, testified on behalf of defendant, in substance, as follows:

That he was a draughtsman and as such was employed by Mr. Bowersock in the summer of 1911 when Sumner I. Smith was there and defendant's paper mill was being overhauled; that he made a draft of the plans suggested by said Smith; that he over-
60 heard a conversation between Mr. Smith and Mr. Dinsmore and testified as follows: "While I was laying out the pipe line from the boilers to the engine, the matter of what we call an emergency valve came up, I had the line in before the matter came up, and so I made a rough sketch, and showed the picture to Mr. Smith, and we talked it over, and he said he didn't know whether that would be of any practical value there or not, because a man getting in the paper machine would be through before we could get to the valve. I don't just remember the details, but the next morning when Mr. Dinsmore made his daily trip around, he came over to the board to see what I was doing, as he usually did, and Mr. Smith was there, and I brought the matter up again of the emergency valve and after I finished explaining the use of it to Mr. Dinsmore, they went out, and Mr. Dinsmore stated that he wanted anything in that would serve to make everything safe. Mr. Smith was there at the time.

Q. Did Mr. Smith say anything?

A. I don't know whether I can remember; he didn't make any objection; if he had I would have remembered it.

Q. Was there anything said about guards at that time?

A. Well, you mean about this valve?

Q. Did Mr. Smith direct you to put it in?

A. Well, after it was talked over between the three of us and no objections were made, I concluded it was to be put in, and I put it in.

Mr. Bishop: We move to strike that out as incompetent, irrelevant and immaterial.

61 Motion overruled. Plaintiff excepts.

Q. State whether or not Mr. Dinsmore said anything to Mr. Smith in regard to guards going in at any other point, or, generally, what he said to him?

A. Well, only in that statement; he said wherever anything can be made more safe put it in. Judging from that I put the valve in because it made the machine more safe, and the valve was put in.

(Transcript pages 104 and 105.)

Defendant introduced in evidence two Exhibits C and D, being

the placard and sketch of the paper machine referred to in the testimony and then rested his case.

(Transcript page 105.)

Rebuttal.

Thereupon said plaintiff in rebuttal introduced only the following testimony of ADA BURHANS SMITH, to-wit:

"Q. Mrs. Smith, you may state to the jury whether or not at the time of your husband's death your home was in Douglas County, Kansas?

Objected to as incompetent, irrelevant and immaterial.

Mr. Bishop: They have introduced the Probate Court records to show that no administration was taken out here, and I went to show the reason why.

The Court: I am rather inclined to the opinion that the
62 authority of this lady to bring this action is admitted by the pleadings, but I will hear the testimony.

Objection overruled. Defendant excepts.

A. No, sir; we were here only temporarily; our home was in Elkhart, Indiana; we were waiting to see if we would be satisfied here.

Q. You intended in case your husband should become dissatisfied, or should be discharged, to move back to Elkhart, Indiana?

A. That was our intention.

Q. Where did you bury your husband?

A. In Elkhart, Indiana.

Q. You may state if when you left here you removed all of your husband's property from Douglas County, Kansas, to Elkhart, Indiana.

Objected to as incompetent, irrelevant and immaterial.

Objection overruled. Defendant excepts.

A. I did.

Q. And you were then and there after appointed administrator of his effects at that place?

A. I was.

Q. After your husband's death, did you receive any money from Mr. Bowersock at Elkhart, Indiana?

Objected to as incompetent, irrelevant and immaterial.

Objection sustained. Plaintiff excepts.

Witness dismissed.

(Transcript page 106).

Said plaintiff then rested her case.

63 The official stenographer of the District Court in and for Douglas County, Kansas, transcribed the entire evidence upon the trial of said action, and duly certified to such transcript which is now on file in the office of the clerk of said court (Transcript page 123).

The appellant has abstracted such parts of the pleadings, record, proceedings and evidence in said cause as exhibits the errors of the trial court in overruling appellant's demurrer to the evidence introduced by appellee, also the errors of said trial court in giving and refusing instructions and other errors mentioned in the specifications of errors, which forms a part of this abstract. All evidence, bearing upon the errors complained of, is fully and correctly abstracted.

Instructions Requested by Defendant.

At the close of all the evidence the defendant presented to the court certain written instructions signed by attorney for defendant with a request that they be given to the jury which instructions, the court refused to give and said defendant excepted. The following are copies of such requested instructions together with the action of the trial court thereon:

In the District Court of Douglas County, Kansas.

ADA BURHANS SMITH, Administratrix, Plaintiff,
vs.
J. D. BOWERSOCK, Defendant.

Instructions Requested by Defendant.

No. 1.

The jury is instructed that under the evidence in this case
64 the plaintiff is not entitled to recover and your verdict will therefore be for the defendant.

W. B. BROWNELL,
Attorney for Def't.

Refused & Def't Ex. C. A. S.

No. 2.

The jury is instructed that before you are justified in rendering a verdict for the plaintiff, you must be satisfied by a preponderance of the evidence, that the exact negligence alleged in plaintiff's petition has been proven, and you are not authorized to speculate or guess, but must be satisfied from the evidence that the alleged injuries of the deceased Sumner I. Smith were due to and caused by the negligence of the defendant as alleged in defendant's petition, and if you find that the alleged injuries resulting in the death of Sumner I. Smith was not caused by the negligence of the defendant herein, as alleged in plaintiff's petition, then the plaintiff has failed to establish her case, and your verdict should be for the defendant.

W. B. BROWNELL,
Att'y for Def't.

Refused & Def't Ex. C. A. S.

No. 3.

The jury is instructed that the basis of plaintiff's cause of action is the alleged negligence of the defendant, or his failure to exercise the care and skill requisite under the facts and circumstances of this case. In this connection, you are instructed that negligence is never presumed, and the burden of proof is upon the plaintiff to establish, by a preponderance of the evidence, all of the material allegations of her petition.

65

W. B. BROWNELL,
Att'y for Def't.

Refused & Def't Ex. C. A. S.

No. 4.

The jury is instructed that if they believe, from a preponderance of the evidence, that Sumner I. Smith, the deceased, was the superintendent in charge of the manufacturing plant of the defendant, having power to hire and discharge workmen, the direction and control of the machinery and the making of all necessary repairs and the placing of all necessary safeguards about the machinery, then the said Sumner I. Smith stood in the place of the defendant, J. D. Bowersock, and was a vice principal, and cannot recover for his own negligence, if any, in failing and neglecting to place a guard on the machinery where he was injured, and your verdict should be for the defendant.

W. B. BROWNELL,
Att'y for Def't.

Refused & Def't Ex. C. A. S.

No. 5.

The court instructs the jury that if they believe from a preponderance of the evidence, that Sumner I. Smith had the control and operation of the machinery in defendant's mill, and had the power to employ and discharge men, and it was his duty to safeguard all machinery, then if he, the said Sumner I. Smith, neglected to safeguard said machinery at the point where he was injured and killed, he cannot recover, and under these circumstances you should find for the defendant.

66

W. B. BROWNELL,
Att'y for Def't.

Refused & Def't Ex. C. A. S.

No. 6.

The court instructs the jury that if they believe from a preponderance of the evidence that Sumner I. Smith had the control and operation of the machinery in defendant's mill, and had the power to employ and discharge men, and it was his duty to safeguard all machinery, then, if the said Sumner I. Smith failed and neglected

to put up a guard at the place where he was injured, this was his negligence, and he cannot recover, and your verdict must be for the defendant.

W. B. BROWNELL,
Att'y for Def't.

Refused & Def't Ex. C. A. S.

No. 7.

The court instructs the jury that if they believe from a preponderance of the evidence that Sumner I. Smith was the superintendent of the manufacturing plant of the defendant, having power to hire and discharge men, the making of all safeguards and repairs to the machinery, and complete direction of the ma-
67 chinery and plant, and as such superintendent he failed and neglected to put up a guard at the place where he was injured and from which injuries he died, and it was practicable to put up su[illegible] guard, and the absence of such guard contributed to his injury and subsequent death, then, in that event, the plaintiff cannot recover, for the wrong of Sumner I. Smith and his negligence in failing to put up the guard if it were practicable, and the absence of which contributed to his death was his own wrong and his own negligence, and he cannot recover damages against the defendant in this case and your verdict should be for the defendant.

W. B. BROWNELL,
Att'y for Def't.

Refused & Def't Ex. C. A. S.

No. 8.

The court instructs the jury, that if they believe from the preponderance of the evidence, that it was not practicable to guard the machinery at the point where Sumner I. Smith was drawn into the machinery and from which injuries he subsequently died, then the jury shall find for the defendant.

W. B. BROWNELL,
Att'y for Def't.

Refused & Def't Ex. C. A. S.

No. 9.

68 The court instructs the jury that if they believe from the preponderance of the evidence that the absence of the guard at the point at which Sumner I. Smith was drawn into the machinery and suffered injuries from which he died, did not contribute to such injuries and death, then, in that event, the jury shall find for the defendant.

W. B. BROWNELL,
Att'y for Def't.

Refused & Def't Ex. C. A. S.

No. 10.

The burden of proof is upon the plaintiff to prove by a preponderance of the evidence that it was practicable to have provided said squeeze rolls, dry rolls and dryer felt rolls with proper safe guard and screens.

Refused & df. ex. C. A. S.

No. 11.

If you find from the evidence that Sumner I. Smith, the deceased, was killed at the time alleged in plaintiff's petition, as a result of a mere accident, without any negligence on his part, or on the part of said defendant, then your verdict must be for the defendant.

Refused & df. ex. C. A. S.

No. 12.

If you find from the evidence that P. A. Dinsmore did not order or direct the said Sumner I. Smith to adjust the said squeeze
69 rolls on said 28th day of November, 1911, then your verdict must be for the defendant.

Refused & df. ex. C. A. S.

The defendant, J. D. Bowersock, excepts to the refusal of the court to give each and every instruction requested by him in said cause, and said defendant, J. D. Bowersock, further excepts to each and every refusal to give the instructions asked by him for the further reason that said refusal to give the instructions requested by him deprives the defendant of his property without due process of law, being repugnant to the 14th Amendment to the United States Constitution, and for the further reason that the said refusals and each of them, denies to the said defendant the equal protection of the laws of the State of Kansas, being repugnant to the 14th Amendment to the United States Constitution, and for the further reason that said refusals and each of them are void and against the law on the ground that sections four, five, six and seven of Chapter 356 of the laws of 1903 of the State of Kansas, and the authority exercised thereunder are repugnant to the Constitution and laws of the United States, and particularly to the 14th Amendment to the United States Constitution, and that said refusals to give instructions and each of them were in favor of such their validity.

W. B. BROWNELL,
Attorney for Defendant J. D. Bowersock.

(Trans. pp. 107 to 112.)

70 And thereupon the court gave to the jury certain written instructions of which the following is a copy, to-wit:

In the District Court of Douglas County, Kansas.

No. 10823.

ADA BURHANS SMITH, Administratrix, etc., Plaintiff,
vs.
J. D. BOWERSOCK, Doing Business as The Lawrence Paper Manufacturing Co., Defendant.

GENTLEMEN OF THE JURY: Plaintiff seeks in this action to recover from the defendant damages for the death of Sumner I. Smith, which death she alleges occurred in this county on the 28th day of November, 1911. She alleges that she is now, and was at the commencement of this action, the duly appointed and acting administratrix of the estate of Sumner I. Smith, and if that allegation is true she is the proper person to bring this action. She further alleges that on the 28th day of November, 1911, the defendant J. D. Bowersock was the owner and operator of the Lawrence Paper Manufacturing Company, and she alleges that said Paper Manufacturing Company was engaged at that time as a manufacturing establishment, in which manufacturing there was on that day used and operated a large amount of machinery in and about the building wherein such business was carried on; that among other articles of machinery there were used in said manufacturing establishment two certain rollers, one known as the "dry roll" and the other the "dryer felt roll," that said two rolls on that day constituted a part of the machinery and equipment of said manufacturing establishment, and that said two rolls so used by the defendant in carrying on and conducting
71 the said business in the manner in which they were used, were dangerous to the lives and limbs of the persons or employes employed by the defendant in this establishment. That on that day the said Sumner I. Smith was in the employ of the defendant as superintendent of said establishment, and while in the discharge of his duties he was caught between the dry roll and the dryer felt roll and was fatally injured, and immediately died from his injuries thus received. She further says that said two rolls on that day were not provided with any guards or screens by the defendant to protect the persons employed in or laboring about the said manufacturing establishment, and that the lack of said guards or screens contributed directly to the death of said Sumner I. Smith. She further claims that through the death of said Sumner I. Smith she has sustained damages in the amount of $10,000. The defendant denies that the plaintiff has capacity to maintain this action.

The defendant also alleges that the death of Sumner I. Smith was the direct result of his own negligence, and the issues thus joined are now before you for trial and determination.

The legislature of this state, at its session of 1903, enacted a law having for its object the protection of persons employed or laboring in manufacturing establishments, which law, in so far as it relates to this case, is now called to your attention. By section 4 it is pro-

vided that every person owning or operating any manufac-
72 turing establishment in which machinery is used shall safely guard the same. The language of the law in so far as it relates to this case is as follows: "All vats, pans, saws, planers, cog gearing, belting, shafting, set screws, and machinery of every description used in a manufacturing establishment shall, where practicable, be properly and safely guarded for the purpose of preventing or avoiding the death of or injury to the persons employed or laboring in any such establishment, and it is hereby made the duty of all persons owning or operating manufacturing establishments to provide and keep the same furnished with safeguards as herein specified."

By section 5 of the same act, in so far as it relates to this case, it is provided: "If any person employed or laboring in any m-nufacturing establishment shall be killed in any case wherein the absence of any of the safeguards or protections required by this act shall directly contribute to such death, the personal representatives of the person so killed may maintain an action against the person owning or operating such manufacturing establishment for the recovery of all proper damages.

You will observe, gentlemen, that in the law above read the words "personal representatives" are used. By that expression is meant the administratrix of the estate of the deceased, and if the plaintiff in this case was at the commencement of this action the duly appointed administratrix of the estate of Sumner I. Smith, then she is the "personal representative" of the deceased, Sumner I. Smith.

73 By section 6 of this act in so far as it relates to this case, it is provided: "In all actions brought under and by virtue of the provisions of this act, it shall be sufficient for the plaintiff to prove in the first instance in order to establish the liability of the defendant, that the death resulted in consequence of the failure of the person owning or operating the manufacturing establishment where such death occurred to provide such establishment with the safeguards as required by this act, and that the failure to provide such safeguards directly contributed to the death.

One of the first questions that will challenge your attention when you retire to deliberate upon your verdict is this: Was the establishment in which Sumner I. Smith was employed, and in which he lost his life, a manufacturing establishment within the meaning of the law. As to that I have to advise you that the law itself by Section 7 thereof, defines the phrase "manufacturing establishments, and so far as it relates to this case reads as follows:

"Manufacturing establishments as these words are used in this act shall mean and include all mills of every kind, machine and repair shops, and in addition to the foregoing any other kind or character of manufacturing establishment wherein any natural products or other articles or materials of any kind in a raw or unfinished or incomplete state or condition are converted into a new or altered or different form."

74 As the plaintiff claims in her petition that the death of Sumner I. Smith was occasioned by the lack of safeguards

about the two rolls mentioned in the petition, namely, the dry roll and the dryer felt roll, your inquiry as to that question will be confined to these two rolls, and if you find that the plant in which Sumner I. Smith was employed was a manufacturing establishment within the meaning of this law, the next question that will challenge your attention is, what was the duty of Mr. Bowersock touching these two rolls. As to that I have to advise you that it was his duty, if it were practicable so to do, to properly and safely guard these two rolls in order to prevent injury to the deceased and other persons engaged in and about this plant. That is a question of fact for your determination, first were these two rolls properly and safely guarded, and, second, if they were not, would it have been practicable to have furnished and kept upon or about these two rolls further or different safeguards. By practicable I mean, could it have been done without substantially interfering with the efficiency of the rolls in the work they were intended to perform and for which they were installed in this plant. If you believe from the evidence that these two rolls were properly and safely guarded, or if they were not that it would have been impracticable to have furnished any different or more complete guards about them, then the plaintiff cannot recover. But if you believe from the evidence that these two rolls were not safely guarded and that further and
75 other and more complete guards would have been practicable, and that the death of the deceased was the direct result of the failure of the defendant, Bowersock, to furnish other, different or more complete guards, then the plaintiff may recover. All these are questions of fact for your determination upon the testimony.

If you find from the evidence that Sumner I. Smith was an employe of the defendant in his paper mill, and that said paper mill was a manufacturing establishment as hereinbefore indicated, and that his death was occasioned directly by the failure of the defendant to safely guard these two rolls, and that it would have been practicable to have thus safeguarded them, then the fact, if it be a fact, that he was the superintendent of this establishment, or this department of the establishment, with authority to repair or safeguard machinery, will not constitute a defense in this action. In other words, if the plaintiff is otherwise entitled to recover under the evidence and the law, her action cannot be defeated by the fact that her husband was the superintendent of this establishment, as no negligence on his part contributing to his injury and death is a defense in this action.

The burden of proof in this case so far as the respective parties are concerned is also provided for in this law, and by section 6 thereof it is provided: That in all actions brought under and by virtue of the provisions of this act, it shall be sufficient for the plaintiff to prove in the first instance in order to establish the liability of the defendant, that the death complained of re-
76 sulted in consequence of the failure of the defendant to provide his establishment with safeguards as required by this

act, and that the failure to provide such safeguards directly contributed to such death."

If the plaintiff has established these facts by a preponderance of the testimony, and the further fact that she was at the commencement of this action the personal representative of Sumner I. Smith, that is, his administratrix, then the burden is upon the defendant to prove by a preponderance of the evidence that other or further safeguards would have been impracticable.

If you find for the plaintiff, the next question that will challenge your attention is the measure of her damages, or the amount of her recovery. If she recovers, she should recover fair compensation for her loss. Nothing can be allowed for grief or sympathy, nothing for pain or suffering to the deceased, but just the financial loss that the death of Sumner I. Smith occasioned to the plaintiff. In that connection you should take into consideration the man himself so far as the evidence discloses, his age, his health, his physical and mental equipment, his education, his earning power, his habits of life, his promotions in a business way, and every other matter or thing shown by the testimony that enables you to judge fairly of the financial loss to the plaintiff occasioned by his death. No full or complete rule can be given, you must be left to your own good judgment.

If Sumner I. Smith at the time of his death was about thirty-four years of age, then his life expectancy would be thirty-
77 two and a half years; that is, if he was thirty-four years of age at the time of his death, his expectancy—that is the time he could reasonably be expected to live would be thirty-two and a half years according to the American Expectancy Table. Take all these facts into consideration and find at last fairly, impartially and dispassionately the financial loss to the plaintiff occasioned by the death of Sumner I. Smith, if you find in his favor.

You gentlemen are the exclusive judges of all questions of fact, of the weight of the testimony and the credibility of the witnesses.

C. A. SMART, *Judge.*

The defendant, J. D. Bowersock, excepts to each and every instruction given by the court in said cause and said defendant, J. D. Bowersock further excepts to each and every instruction given by the court for the further reason that said instructions and each of them deprive the defendant of his property without due process of law, being repugnant to the 14th Amendment to the United States Constitution, and for the further reason that said instructions and each of them deny to said defendant the equal protection of the laws of the State of Kansas, being repugnant to the 14th Amendment to the United States Constitution, and for the further reason that said instructions and each of them are void and against the law on the ground that sections four, five, six and seven of Chapter 356 of the laws of 1903 of the State of Kansas, and the
78 authority exercised thereunder are repugnant to the Constitution and laws of the United States, and particularly to the

14th Amendment to the United States Constitution, and that said instructions and each of them were in favor of such their validity.

W. B. BROWNELL,
Attorney for Defendant, J. D. Bowersock.

(Trans. pp. 113 to 119.)

Verdict.

On the 18th day of June A. D. 1913, the jury returned into court a verdict in favor of the plaintiff for the sum of $10,000, and judgment was rendered thereon.

Motion for New Trial.

And thereafter, in due time, on the 21st day of June, A. D. 1913, said defendant filed his motion for a new trial which, omitting caption, reads as follows:

Motion for a New Trial.

Comes now the defendant, J. D. Bowersock, and moves the court that the verdict of the jury in said cause be vacated and a new trial granted for the following reasons substantially affecting the rights of the defendant:

1. Erroneous rulings and instructions of the court.
2. Refusal to give instructions asked by the defendant.
3. Abuse of discretion of the court.
4. Accident and surprise which ordinary prudence could not have guarded against.
5. Misconduct of the jury.
79 6. That the verdict of said jury was given under the influence of passion and prejudice.
7. That the verdict of the jury is in whole contrary to the evidence.
8. That the verdict of the jury is in part contrary to the evidence.
9. Newly discovered evidence material to said defendant which he could not with reasonable diligence have discovered at the trial.
10. Errors of law occurring at the trial.
11. That the verdict of the jury is against the law and the evidence.
12. That the verdict and decision of said jury deprive the defendant of his property without due process of law, being repugnant to the 14th Amendment to the United States Constitution.
13. That the verdict and decision of said jury deny to said defendant the equal protection of the laws of the State of Kansas, being repugnant to the 14th Amendment to the United States Constitution.
14. That the verdict and decision of said jury are void and against the law on the ground that sections four, five, six and seven of

Chapter 356 of the laws of 1903 of the State of Kansas, and the authority exercised thereunder are repugnant to the constitution and laws of the United States, and particularly to the 14th Amendment to the United States Constitution, and that said verdict and decision were in favor of such their validity.

W. B. BROWNELL,
Attorney for Defendant.

(Trans. p. 121.)

80 *Overruling Motion for New Trial.*

Afterwards, on the 17th day of January A. D. 1914, the said motion of defendant for a new trial was overruled by the court, and excepted to by defendant.

Thereafter, to-wit, on the 12th day of March, 1914, said plaintiff filed a motion alleging that the clerk of said court had "entered said verdict upon the journal as required by law, but failed and neglected to enter said judgment upon said journal," and moved the court "for an order nunc pro tunc directing the clerk to enter said judgment upon the journal of this court as of date June 18th, 1913," which motion was by the court sustained.

Notice of appeal, by defendant from the ruling of the court on the demurrer to the evidence, the refusal of the court to give instructions, requested by the defendant, and the instructions given by the court, to the overruling of the motion for a new trial and all other orders and rulings of the court, was given in due time to, and service thereof acknowledged by said plaintiff and filed with the clerk of trial court on the 17th day of March, 1914, and received by the clerk of this court with transcript of judgment in said case on the 18th day of March, 1914, and the time to serve appellant's abstract was afterwards extended to the 15th day of August, A. D. 1914.

Statement of Attorney.

The above and foregoing is a correct and true abstract of the record, evidence and proceedings in said cause, so far as appellant deems necessary for the consideration of the court.

McCABE MOORE,
Attorney for Said Appellant.

81 *Specification of Errors.*

(1) The court erred in overruling the demurrer of defendant to the evidence introduced on behalf of said plaintiff found upon page 35 of appellant's printed abstract.

(2) The court erred in the admission of the testimony of Ada Burhams Smith in rebuttal page 61.

(3) The court erred in not instructing the jury to find a verdict for the defendant after all the evidence of plaintiff and defendant had been introduced (Abstract page 63).

(4) The court erred in refusing to give the instructions requested by defendant Nos. 1 to 12 inclusive (Abstract, pages 63 to 68).

(5) The court erred in the instructions it gave to the jury found on pages 70 to 77 of appellant's printed abstract.

(6) The court erred in overruling the motion of defendant for a new trial, found on page 80 of appellant's printed abstract.

82 And afterwards, on the 26th day of February, 1915, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas the counter abstract of the appellee, which counter abstract is in the words and figures as follows, to-wit:

83 Filed Feb. 26, 1915. D. A. Valentine, Clerk Supreme Court.

No. 19371.

In the Supreme Court of Kansas.

ADA BURHANS SMITH, Administratrix of the Estate of Sumner I. Smith, Deceased, Appellee,

vs.

J. D. BOWERSOCK, Doing Business as the Lawrence Paper Manufacturing Company, Appellant.

Appeal from the District Court of Douglas County, Kansas.

Honorable Charles A. Smart, Judge.

ABSTRACT OF APPELLEE.

Brief of Appellee on Motion to Dismiss Brief of Appellee on the Merits.

S. D. Bishop, J. H. Mitchell, Lawrence, Kansas, Attorney for Appellee.

84 In the Supreme Court of Kansas

No. 19371.

ADA BURHANS SMITH, Administratrix of the Estate of Summer I. Smith, Deceased, Appellee,

vs.

J. D. BOWERSOCK, Doing Business as the Lawrence Paper Manufacturing Company, Appellant.

Appeal from the District Court of Douglas County, Kansas.

Honorable Charles A. Smart, Judge.

Appellee's Abstract.

ALBERT F. NEUBAUER, witness for appellee, testified in relation to the guarding of the machinery, wherein Sumner I. Smith was killed, as follows:

Q. Now, you may state to the jury if the dryer rolls and dryer felt rolls, and squeeze rolls were thereafter guarded and screened,

A. They were.
Q. When?
A. That same night or day. That evening.
85 Q. How did they guard them?
A. By putting up a plank across, and bolting it on so as to keep anybody from getting down in there.
Q. Was that ever guarded prior to the death of Mr. Smith?
A. No, sir.
Q. But it was guarded immediately afterwards?
A. Yes, sir.
Q. By whose instruction or direction was that machinery guarded?
A. Mr. Dinsmoor.
Q. Who is Mr. Dinsmoor?
A. The assistant manager (Transcript 10 & 11).
Q. What was the object in putting that guard up there?
A. We put the guard up there to keep somebody else from getting their hand in there, that is what we put it up there for.
Q. Was this guard sufficient to keep other men from getting their hands between these rolls?
A. Yes, sir.
Q. How did you handle the paper after the guard was put up there?
A. We handled it the same as we did before.
Q. Did the guard act as a prevention to anybody getting their hand between the two rolls?
A. Yes, sir (Transcript 15).

GARFIELD FEARING, witness for appellee, testified as follows:

Q. Now you may state to the jury if these two rolls, the dryer roll and the dryer felt roll, run together.
A. Well, they don't touch each other.
86 Q. You may state to the jury if there were any guards or screens along the dryer felt roll and the dry roll on the 28th day of November, or at the time Mr. Smith was killed?
A. No, sir; there was not.
Q. Was that afterwards guarded?
A. Yes, sir.
Q. When?
A. That night after supper.
Q. Can you describe to the jury the office of that guard, what was it there for?
A. Why, it was to keep anyone else from falling in.
Q. Describe it to the jury?
A. Why it was a plank about two by eight, fastened to the dryer on the frame of the squeeze rolls, one end fastened on this side and one on the other, right above the dryer felt rolls.
Q. You may state to the jury if the machine run just the same

with the guard on and these rolls performed the same office just as well with the guard on as without it.

A. Yes, sir (Transcript, pages 26 & 27).

WILLIAM O'BRIEN, witness on behalf of appellant, and superintendent of appellant's paper mill, testified as follows:

Q. You don't know whether that guard has destroyed the efficiency of that machine or not, do you?

A. What is that, I didn't get that.

Q. You don't mean to say that board has destroyed or impaired the efficiency of that machine, do you?

A. No, we are still running it.

Q. Since you have been in the operation of that paper mill as superintendent nobody has fallen into this particular place with that guard rail up there, have they?

A. No (Transcript, page 74).

87 J. F. ELLSWORTH, a witness on behalf of appellant, testified as follows:

That he was a man of wide experience, in the building of paper machinery and paper mills, and had been in the business of manufacturing paper since 1870, and testified further as to the practicability of guarding the machinery wherein Sumner I. Simth was killed as follows:

Q. Did you see the guard rail put up there?

A. Oh, yes.

Q. Did you watch the machine running yesterday?

A. Yes, I saw it running.

Q. The paper was running down in there all right?

A. Yes.

Q. You didn't see any difficulty with it, did you?

A. Not a bit.

Q. And you don't pretend to swear to this jury that it destroys the efficiency of the machine, do you?

A. No. (Transcript, pages 79½ & 80).

J. D. BOWERSOCK, appellant, testified as follows:

I was the sole owner of the paper mill, and had the management of it except as to the details, and had the full power to discharge men if they were not doing their duty; that Mr. Irving Hill was the manager of the business, and that Mr. Dinsmoor was the assistant manager of the business.

Q. I take it from your acquaintance with Mr. Smith, that he did not report to you at all, did he?

A. I do not think Mr. Smith ever reported to me.

87½ Q. Who did he report to?

A. I presume Mr. Hill.

Q. Or to Mr. Dinsmoor?

A. Or to Mr. Dinsmoor.

Q. Mr. Dinsmoor was individually engaged in that business during this time, during the year 1911, was he not; his whole time was put in in the paper mill?

A. I think it was (Transcript, pages 46, 47 and 48).

We, the attorneys of record for the appellee, hereby certify, that the above and foregoing abstract of appellee, is necessary in order to give this court a full understanding of the questions which are presented to this court for review.

S. D. BISHOP,
J. H. MITCHELL,
Attorneys for Appellee.

88 And afterwards, on the 3d day of March, 1915, the same being one of the regular judicial days of the January Term, 1915, of the Supreme Court of the State of Kansas, before the said court in session at the Supreme Court room in the city of Topeka, the following proceeding, among others was had and entered of record in words and figures as follows, to-wit:

89 In the Supreme Court of the State of Kansas, Wednesday, March 3, 1915.

No. 19371.

ADA BURHANS SMITH, Adm'x, etc., Appellee,
vs.
J. D. BOWERSOCK, etc., et al., Appellants.

This cause comes on to be heard on the notices of appeal, transcript of the judgment and abstract of the record of the district court of Douglas county; thereupon after oral argument by McCabe Moore for the appellant, and by S. D. Bishop and J. H. Mitchell for the appellee, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

90 And afterwards, on Saturday the 10th day of April, 1915, the same being one of the regular judicial days of the January Term, 1915, of the Supreme Court of the State of Kansas, before the said Court in session at the Supreme Court room in the city of Topeka, the following proceedings, among others, was had, and entered of record in words and figures as follows, to-wit:

91 In the Supreme Court of the State of Kansas, Saturday, April 10, 1915.

No. 19371.

ADA BURHANS SMITH, as Adm'x, Appellee,
vs.
J. D. BOWERSOCK, etc., Appellant.

This cause comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It

is further ordered that the appellants pay the costs of this case in this court taxed at $— and hereof let execution issue.

92 And also on the same day, to-wit, the 10th day of April, 1915, there was filed in the office of the clerk of the Supreme Court of the State of Kansas the Opinion of the Court with the Syllabus thereto, which Opinion and Syllabus are in the words and figures as follows, to-wit:

93 No. 19,371.

ADA BURHANS SMITH, as Administratrix, etc., Appellee,

vs.

J. D. BOWERSOCK, Doing Business as The Lawrence Paper Manufacturing Company, Appellant.

Appeal from Douglas County, Affirmed.

Syllabus by the Court.

JOHNSTON, *C. J.*:

1. An appeal may be taken from an order overruling a motion for a new trial within six months after the order is made although more than that time has intervened between the entry of judgment upon the return of the verdict and the taking of the appeal, and all rulings and questions that were open for consideration on the motion for a new trial are open for review on the appeal.

2. The appointment of the plaintiff as administratrix alleged in a petition is not put in issue by an answer denying that the plaintiff has capacity to sue and a verification alleging that the facts stated in the answer are true.

3. All persons employed or laboring in a manufacturing establishment are entitled to the protection provided for in the factory act (Laws 1903, ch. 356; Gen. Stat. 1909, secs. 4673-4683) without regard to the nature of their employment, their rank or grade, and it is the duty of the owner or operator to furnish safeguards for dangerous machinery where it is practicable to do so and if he fails in his duty in this respect he will become liable for the injury and death of any employee, including a superintendent of the factory, which results from the omission of this duty, and this although the superintendent was authorized to direct and control the de-

94 tails of the business under the supervision of the owner and operator and his managers and although the dangerous character of the machinery and the practicability of safeguarding it was open and obvious; and is further held, under the evidence in this case, that there is nothing in the relations of the parties or the circumstances of the case to absolve the defendant from liability for the death of the superintendent which resulted from his failure to

provide safeguards conceded to have been practicable and necessary to the safety of employees.

All the justices concurring.

A true copy.
Attest:
D. A. VALENTINE,
Clerk Supreme Court.

[Seal Supreme Court, State of Kansas.]

95 No. 19371.

The opinion of the court was delivered by

JOHNSTON, *C. J.:*

Ada Burhans Smith brought this action against J. D. Bowersock, doing business as The Lawrence Paper Manufacturing Company, to recover damages under the factory act (Laws 1903, ch. 356; Gen. Stat. 1909, secs. 4676-4683) for negligently and carelessly causing the death of Sumner I. Smith, her husband. In her petition plaintiff alleged, substantially, that she was the duly appointed and acting administratrix of the estate of Sumner I. Smith, deceased, having been appointed by an Indiana court which had probate jurisdiction; that defendant was the owner and operator of The Lawrence Paper Manufacturing Company at Lawrence; that such machinery, including squeeze rolls, dry rolls and dryer felt rolls, was used in the business of the company; that on November 28, 1911, Sumner I. Smith was employed by defendant as superintendent of his manufacturing establishment and while in the discharge of such duty was ordered by one P. A. Dinsmoor, his superior and assistant manager of the establishment, to adjust the squeeze rolls; and that in attempting to comply with Dinsmoor's order Smith fell and was caught between the dryer felt rolls and fatally crushed and killed. Plaintiff further alleged that it was practicable to have provided the squeeze rolls, dry rolls and dryer felt rolls with proper and safe guards or screens; that the lack of such guards or screens directly contributed to and was the proximate cause of Smith's death; that at the time of Smith's death he was in perfect health and earning $150 a month; that she was the widow and sole heir at law of Sumner I. Smith; and that because of her husband's death which resulted from the failure of defendant to properly guard and screen the machinery in the establishment she was damaged to the sum of $10,000. Defendant answered denying plaintiff's capacity to sue and alleged that on November 28, 1911, Smith was the superintendent of defendant's manufacturing establishment and had complete direction of it including the safeguarding of all machinery in it, and that if Smith was injured and died on November 28, 1911, from the injuries it was because of his own carelessness and negligence in putting his hand into the machinery and attempting to adjust

certain squeeze rolls. Defendant also denied the practicability
96 of guarding and screening the rolls and machinery, and that the lack of such guards was the proximate or directly contributing cause of the injury to Smith, and alleged, further, that if the machinery was not properly guarded or screened Smith, as superintendent, was responsible therefor and assumed the risk thereof. This answer of defendant was verified. On the trial of the case plaintiff offered evidence tending to show her capacity to sue, and also that at the time of Smith's death he was acting under the orders of his superior Dinsmoor; that is was practicable to guard and screen the rolls, in fact that a board was put in position to guard the rolls which caught Smith shortly after his injury and death; and that Smith was a kind and affectionate husband having, at the time of his death, an expectancy of life of thirty-two and one-half years and an earning capacity of $1800 a year. Defendant's demurrer is plaintiff's evidence was overruled, and he then undertook to prove that it was impracticable to guard and screen machinery; that it was the duty of Smith to properly guard and protect the machinery for the prevention of accidents to the workmen; and that a general order for the safeguarding of the machinery had been made by defendant at one time but had been deferred on the advice of Smith. On June 18, 1913, the jury returned a verdict in favor of plaintiff fixing the amount of her recovery at $10,000 and on the same day judgment was entered thereon. Defendant's motion for a new trial filed on June 21, 1913, was overruled on January 17, 1914, and this appeal was taken on March 17 1914.

Plaintiff has moved for the dismissal of this appeal on the ground that it was not taken within six months after the rendition of the judgment. Under the recent enactment an appeal must be perfected "within six months from the date of the rendition of the judgment or order appealed from." (Laws 1913, ch. 241, sec. 1.) The code authorizes an appeal from a final order as well as one which grants or refuses a new trial. (Civ. Code, sec. 565.) The order appealed from in this case is the one overruling the motion for a new trial and it has been often held that an appeal may be taken from that order within the time limited although more than that time has intervened between the rendition of the judgment and the taking
of the appeal. On such appeals all rulings and questions
97 fairly involved in the motion for a new trial are open for review here.

(Osborne, Ex'r, v. Young, 28 Kan. 769;
Thompson v. Wheeler & Wilson Mfg. Co., 29 Kan. 476;
Rates v. Lyman, 35 Kan. 634, 12 Pac. 33;
Crawford v. K. C., Ft. S. & G. Rld. Co., 45 Kan. 474, 25 Pac. 865;
Surety Co v. Ashmore, 74 Kan. 325, 86 Pac. 453;
Benefit Association v. Wood, 78 Kan. 812, 98 Pac. 219.)

The questions discussed appear to have been fairly involved in the motion for a new trial which was refused and the appeal having

been taken within six months from the time the order denying the motion was made the questions are open for review on this appeal.

It is contended that there was error in the ruling of the court refusing to instruct the jury to return a verdict in favor of the defendant. This contention is based mainly on the claim that the plaintiff was appointed as the administratrix of the estate of Sumner I. Smith by a court of Indiana notwithstanding that the evidence showed that he was a resident of Kansas when he died. In her petition plaintiff alleged that she was duly appointed as administratrix and the only statement in defendant's answer respecting the appointment was a denial that she "has capacity to sue in said action and demand the relief sought." The verification of the answer was "that the facts therein stated are true." The statement that she had no capacity to sue is a mere conclusion. The facts relating to capacity to sue or showing incapacity to bring and maintain the action were not alleged and hence no facts were stated and the verification was not such as to put the appointment of the plaintiff in issue. (Kimble v. Bunny, 61 Kan. 665, 60 Pac. 746.) In Caple v. Drew, 70 Kan. 136, 78 Pac. 427, there was an averment in the petition of an appointment as a guardian and a verified answer denying the averments of the petition but in the verification it was stated that the denials or contents of the answer were true. It was held that the code contemplates that denials may be verified and that the answer so verified put in issue the averments of the petition relating to appointment. There, however, facts were stated on one
98 side and denials made on the other with an affidavit that the denials were true. Here, there is no statement to the effect that the denials were true. The answer contained nothing on the subject beyond the averment that the plaintiff had no capacity to sue, which, as we have seen, was not an allegation of fact, and the mere statement in the verification that the facts stated were true did not put the appointment in issue. Apart from that consideration plaintiff offered testimony which tends to support the theory that the legal residence of the Smiths was in Indiana where the appointment was made and that they were only temporarily in Kansas. The question of the residence of one appointed as administratrix is one of fact (Livermore v. Ayres, 86 Kan. 50, 119 Pac. 549,) and the jury has decided, upon what appears to be sufficient evidence, that the plaintiff was duly appointed. The defendant calls atention to a number of facts and circumstances which he claims strongly tend to show that the Smiths were in fact residents of Kansas instead of Indiana but the finding of the jury has settled the dispute in favor of the plaintiff. It may be added that it appears from the petition and the proof that the plaintiff is the widow and sole heir of the deceased and even if she could not be regarded as an administratrix a recovery in her character as a widow might be sustained (Railway Co. v. Mills, 57 Kan. 687, 47 Pac. 834.)

It is next contended that no recovery can be had by plaintiff on the ground that Smith occupied the position of superintendent in the paper mill and was not in the class that the factory act was

designed to protect and, further, that the duty of safeguarding dangerous machinery in the mill was not owed by the defendant to Smith In his testimony defendant stated that he employed Smith to superintend the plant and to look after the machinery which involved the safeguarding of it. By his testimony it was shown that about a week before the accident defendant prepared a notice of caution to his employees in his mill and power plant, his iron works and ice plant and also the paper mills, in which it was stated that:

99 "If there is any machinery, dangerous place or tool that you think should be safeguarded, repaired or improved, we will regard it a favor if you will report same at once to the office. It is desired that all employes assist in reducing accidents to the lowest possible point." This was addressed to every employee of his and was signed by the names of the four different establishments. The notice was posted in each of the manufacturing establishments operated by defendant. The plaintiff calls attention to testimony to the effect that the defendant, who was the owner and operator of the paper mill and other establishments, had Irving S. Hill as manager of his plants and Paul A. Dinsmoor as assistant manager under whom Smith was acting. The necessity for guards, it was shown, was open and obvious and that the duty devolved on defendant and his managers to provide suitable machinery and appliances. Although the defendant stated that Smith was employed as an expert paper maker who was acquainted with machinery used for that purpose and that defendant and his managers depended on him to attend to the machinery and the details of paper making the evidence was that neither the defendant nor his managers had ever directed him to screen or guard this machinery. Plaintiff calls attention to testimony to the effect that although the defendant and his managers had observed the operation of the machinery and the perils of the situation and had provided guards for other parts of the establishment they failed to provide guards for this machine until after Smith was killed in it. Testimony was offered to the effect that the manager did not think that it was either necessary or practicable to safeguard the rolls where Smith lost his life and that such machines and places as were known or deemed by him to be dangerous had been safeguarded. It appears, too, that a number of experts whose testimony was introduced by the defendant testified that it was not practicable to place a guard on the rolls and that it would have interfered with the efficiency of the machinery. Although considerable effort was expended in the trial to show that no liability could attach under the factory act because of it being impracticable to safeguard the machinery it is now conceded by the defendant that it was practicable to safeguard the machine in which Smith was killed. The present contention is that because of the position

100 of Smith and the control exercised by him he was not within the protection of the provisions of the factory act. That act provides that every person owning or operating a manufacturing establishment must safeguard the machinery and appliances wherever it is practicable, so as to protect the lives and limbs of employees.

Only two classes are mentioned in the act, the owner or operator on one side and the employee on the other. The language of the act shows that it was intended to protect all employees without regard to the rank or grade of their service in the manufacturing establishment. The fact that an employee may be acting as superintendent or foreman or is superior in some respects to other employees in the establishment does not place him outside of the class of employees or of the protection which the law was designed to afford. He may have charge of a group of men who are inferior to him in service or may have charge of a machine or an appliance and still be an employee within the meaning of the act. In Rank v. Packing Box Co. 92 Kan. 917, 142 Pac. 943, it was contended that the provisions of the act requiring belt-shifters or safe mechanical contrivances for throwing on or off belts or pulleys was intended only for the protection of a workman engaged in shifting belts. The court declined to place so narrow an interpretation on the provision and it was held that the act was intended to protect other workmen operating the machine. The act is entitled to a liberal interpretation with a view of carrying out its manifest purposes, one of which was "to wipe out this narrow and conditional liability and substitute another." (Caspar v. Lewin, 82 Kan. 604, 628, 109 Pac 657.) The protection of the statute is given to "all persons employed or laboring in any manufacturing establishment," and the rules of the common law as to superior servants do not apply; nor does assumed risk or contributory negligence enter into the question of liability. A superintendent, although having larger control than others, is nevertheless an employee. In defining the word it has been said that:

"The term may include an attorney, a bookkeeper, a builder or contractor, a civil engineer, a clerk, a collector, a day laborer, a drayman, a fireman, an insurance adjuster, a keeper of accounts, a laborer, a mechanic, an official, a physician, a policeman, a
101 railroad conductor, railroad agent, railroad superintendent, those engaged in operating the road and the like, * * *
(15 Cyc. 1032).

The expression "all persons employed or laboring in any manufacturing establishment" is general and comprehensive, and nothing in the provisions of the act prescribes limitations or indicates a purpose to except from its operation any one employed there because of the nature of his employment, his grade or his rank. Smith did supervise the work done in the paper mill but he was subordinate to the owner and his managers. The condition of the machinery and the peril of operating near it was open to the observation of the defendant and those who were managing his business Smith doubtless observed and understood the danger, too, and if assumption of risk and contributory negligence were defenses in an action under the act the plaintiff would have found much difficulty in establishing a right of recovery. While Smith superintended the details of the making of paper and the running of the plant the defendant and his managers controlled the establishment and the expenditures made in it. An application for an appropriation to safeguard the machinery might or might not have been approved. The fact that

the defendant called experts in paper making as witnesses to show that it was neither practicable nor necessary to safeguard the machinery and that the manager Hill testified that places in the mill which he deemed to be dangerous had been safeguarded and also that in his experience such rolls and machinery were not regarded as dangerous and his statement that in a number of mills which he had visited rolls like these were not safeguarded indicates, to some extent, how a suggestion of Smith that they be safeguarded would have been received. In the effort to shift the responsibility for the failure to safeguard the machinery attention is called to the notice prepared by defendant asking employees to report to the office any machinery, place or tool that they might think should be safeguarded or repaired. This was addressed to each employee in the four establishments operated by defendant, and while the notice appears to have been brought directly to the attention of Smith it will be observed that the employees were not requested to report to the
102 superintendent but were required to report to the office which was in charge of the defendant and his managers. Under the notice, Smith as well as others employed in the mill were only requested to make a report of conditions to the office in order to "assist in reducing accidents to the lowest possible point." An owner or operator can not discharge the duties imposed on him by the statute nor rid himself of liability under the act by posting admonitions to employees or the issuance of instructions to them or the making of rules for their guidance. (Caspar v. Lewin, 82 Kan. 604, 109 Pac. 657.) Cases may possibly arise where a person employed in a manufacturing establishment may not be entitled to claim the protection of the act as against an owner or operator but certainly nothing appears in the circumstances of the present case or the relations of the parties which took Smith out of the protection of the act or absolved the defendant from liability for failing to provide safeguards for machinery which it is conceded were practicable and necessary to the safety of employees.

The question raised upon the instructions are substantially the same as have been already considered and nothing is found in any of them or in any of the errors assigned which would justify a reversal.

The judgment of the district court is affirmed.

All the justices concurring.

A true copy.

Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

103 And afterwards, on the 29th day of April, 1915, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, a Petition for a rehearing, which petition is in the words and figures as follows, to-wit:

104 Filed Apr. 29, 1915. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of Kansas.

No. 19371.

ADA BURHANS SMITH, Administratrix of the Estate of Sumner I. Smith, Deceased, Appellee,

vs.

J. D. BOWERSOCK, Doing Business as the Lawrence Paper Manufacturing Company, Appellant.

Appeal from the District Court of Douglas County, Kansas.

Petition for Rehearing.

C. F. Hutchings, McCabe Moore, Attorneys for said Appellant.

105 In the Supreme Court of Kansas.

No. 19371.

ADA BURHANS SMITH, Administratrix of the Estate of Sumner I. Smith, Deceased, Appellee,

vs.

J. D. BOWERSOCK, Doing Business as the Lawrence Paper Manufacturing Company, Appellant.

Appeal from the District Court of Douglas County, Kansas.

Petition for Rehearing.

The above named appellant respectfully prays the court for a rehearing in above entitled case for the following reasons:

First. The decision is founded on an erroneous application of the law to the facts in said case.

Second. The statute, on which the alleged cause of action of said appellee is based, as construed and applied in this case, is in
106 conflict with that provision of the 14th Amendment of the Constitution of the United States, which declares that no state shall deprive any person of liberty or property without due process of law.

There is no question but what the police power of a state may be properly exercised for the preservation of the public health, safety, morals, or general welfare and may reasonably limit the enjoyment of property, but legislative power, relating to such matters, is subject to judicial review and whenever a statute is arbitrary or unreasonable and therefore exceeds the exercise of legislative authority,

it may be declared invalid in proper judicial proceedings in order that the supremacy of the constitution may be maintained.

When a person invokes the Federal Constitution for the protection of rights which it secures to him, against unreasonable and unnecessary enactments of a state legislature, the determination of the question as to what his rights in such matters are, does not "depend upon the form of the state law, or even upon its declared purpose, but rather upon its operation and effect as applied and enforced by the state." (Coppage v. Kansas, 35 S. Ct. 244.)

In the case at bar, the operation and effect of the Kansas statute, involved, as construed, applied and enforced, takes property from appellant, who was not negligent or guilty of any wrong, and gives it to appellee, the widow of Sumner I. Smith, who was killed
107 solely because of his own negligence in failing to guard a machine, which he had obligated himself to guard, by his contract with appellant, in order that the provisions of said statute might be complied with.

The operation and effect of said state statute, as applied and enforced by the state, is that machinery in manufacturing establishments must be guarded, whenever practicable, but that if the owner (corporation or individual) of such an establishment does not possess the requisite qualifications to know when guards are practicable, or the skill to construct them, such owner cannot employ and pay an expert superintendent or vice-principal who does possess such qualifications, to guard such machinery for the protection of all other employes in order to comply with the statute, without becoming liable to that man, in heavy damages, for injuries he may suffer solely because of his own wrongful neglect by not using a guard, which he had contracted to do, even though such owner had not been negligent in the slightest degree and was not at fault in any manner.

Can a state thus take property from one man, who is not at fault and has not committed any wrong, and give it to another man, who is the only person at fault and who has wrongfully neglected to do his duty and is injured solely because of his wrongful failure to do that duty which he is paid to perform and which he has contracted to do?

That such is the operation and effect of the Kansas statute in question, as construed, applied and enforced by the decision
108 of the court, in case at bar, is plainly shown by the record.

Even if the peremptory instruction No. 1 (Appellant's Abstract, pp. 63-64), requested by appellant to find a verdict for him was rightfully refused by the trial court, for the reason that it was thought the evidence did not conclusively show it was the sole duty of Sumner I. Smith to guard the machine on which he was killed and that he was killed without any fault on the part of appellant, who owed no duty, to the said Smith, to guard the said machine, still there was an abundance of positive evidence on those questions of fact which appellant was entitled to have the jury consider and pass upon, in rendering a verdict, under the guidance of

other proper instructions which were requested by appellant. (Instructions 2, 4, 5 and 6, Appellant's Abstract, pp. 64-66.)

Said instructions requested by appellant are as follows:

(2) "The jury is instructed that before you are justified in rendering a verdict for the plaintiff, you must be satisfied by a preponderance of the evidence, that the exact negligence alleged in plaintiff's petition has been proven, and you are not authorized to speculate or guess, but must be satisfied from the evidence that the alleged injuries of the deceased, Sumner I. Smith, were due to and caused by the negligence of the defendant as alleged in defendant's petition, and if you find that the alleged injuries resulting in the death of Sumner I. Smith was not caused by the negligence of the defendant herein, as alleged in plaintiff's petition, then the
109 plaintiff has failed to establish her case, and your verdict should be for the defendant."

(4) "The jury is instructed that if they believe, from a preponderance of the evidence, that Sumner I. Smith, the deceased, was the superintendent in charge of the manufacturing plant of the defendant, having power to hire and discharge workmen, the direction and control of the machinery and the making of all necessary repairs and the placing of all necessary safeguards about the machinery, then the said Sumner I. Smith stood in the place of the defendant, J. D. Bowersock, and was a vice-principal, and cannot recover for his own negligence, if any, in failing and neglecting to place a guard on the machinery where he was injured, and your verdict should be for the defendant."

(5) "The court instructs the jury that if they believe from a preponderance of the evidence, that Sumner I. Smith had the control and operation of the machinery in defendant's mill, and had the power to employ and discharge men, and it was his duty to safeguard all machinery, then if he, the said Sumner I. Smith, neglected to safeguard said machinery at the point where he was injured and killed, she cannot recover, and under these circumstances you should find for the defendant."

(6) "The court instructs the jury that if they believe from a preponderance of the evidence that Sumner I. Smith had the control and operation of the machinery in defendant's mill, and had the power to employ and discharge men, and it was his duty to safeguard all machinery, then, if the said Sumner I. Smith failed and neglected to put up a guard at the place where he was injured, this was his negligence, and he cannot recover and your verdict must be for defendant."

110 The refusal of the trial court to give to the jury said instructions, requested by appellant, and the affirmance of such rulings of the trial court by the highest court of the state, deprived appellant of the right to show and maintain as a defense in said action, that he owed no duty to Sumner I. Smith to guard the machine and that said Smith owed that duty to appellant pursuant to a contract of employment, under which said Smith became superintendent, and by which contract each of said parties thereto was liable in damages to the other for any breach thereof caused by a

failure of performance. And said ruling of said courts, in effect, makes said appellant liable in damages for the breach of said contract by said Sumner I. Smith when there was and is no breach of said contract by said appellant, and no breach of any duty of appellant to said Smith, which ruling of said courts, in construing and applying the statute on which the alleged cause of action of appellee is based, causes said statute to operate and be enforced in a manner which is in violation of the fundamental law of the land.

After said contract was entered into between appellant and Sumner I. Smith, whereby the latter became superintendent, under a contractual obligation to guard all machinery when practicable, each of said parties would become "responsible in damages for a violation of this contract" (Coppage v. Kansas, 35 S. Ct. 247), consequently if appellant is compelled to expend any money because Sumner I. Smith wrongfully neglected to guard the machinery
111 thereby violating his contract, then the said Smith would be "responsible in damages" to said appellant for the amount appellant may pay out on account of the violation of said contract by said Smith.

If said Smith, himself, received a personal injury because of his violation of that contract, and appellant had not violated said contract, and had performed every duty he owed to said Smith, then appellant would not be liable for damages to said Smith, and any statute imposing such a liability under such circumstances would be in conflict with the 14th Amendment to the United States Constitution.

In the case of Coppage v. Kansas, the United States Supreme Court, supra (35 S. C. p. 247), cites with approval the decision of this court in the case of Coffeyville V. B. & T. Co. v. Perry, 69 Kans. 297, wherein it was held:

"The business conducted by the defendant, was its property and in the exercise of its ownership it is protected by the Constitution. * * * it is at liberty to contract for the services of persons in any manner, that is satisfactory to both. No legislative restriction can be imposed upon the lawful exercise of these rights."

As it was lawful for Sumner I. Smith to contract to guard the machinery, of appellant, when practicable, it would be unreasonable and contrary to the fundamental law, for the legislature to
112 place restrictions upon the lawful exercise of the rights of either party to contract, for otherwise the appellant would not be "at liberty to contract for the services of persons in any manner that is satisfactory to both."

The United States Supreme Court, in Lochner v. New York, 198 U. S. 45, 25 S. C. Rep. 546, in deciding the New York statute, limiting employment in bakeries to 60 hours a week and 10 hours a day, was in violation of the U. S. Constitution, and not a valid exercise of the police power of the state, said:

"The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be de-

termined from the natural effect of such statutes when put in operation, and not from their proclaimed purpose."

Likewise, in case at bar, whether the Kansas Statute is or is not repugnant to the Constitution of the United States must be determined from the effect of such statute "when put in operation," by a decision of highest court of the State, and "upon its operation and effect as applied and enforced by the State."

The effect of the decision of this court in case at bar is that appellant had no power, nor right, to employ Sumner I. Smith, as superintendent, or vice-principal to guard all machinery and absolve appellant from liability to said Smith, if said Smith was injured solely because he (Smith) violated his contract of em-
113 ployment by wrongfully neglecting to place guards on the machine on which he was injured, without any breach of the contract by appellant who fulfilled every duty he owed to said Smith.

The effect of said decision is that said State Statute prohibits such a contract of employment being made by the owner of a manufacturing establishment, though such owner be a corporation which can act only by means of some human who must be employed to guard the machinery in order that the terms of the statute may be complied with.

Appellant contends that such statute, so construed and applied is in conflict with the 14th Amendment to the Constitution in that it deprives appellant of property without due process of law. This contention was made in the trial court, in the motion for a new trial and in this court, as shown by appellant's brief and abstract filed in said action.

Is it a fair, reasonable and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference of the right of the individual," for a statute to provide that owners of manufacturing establishments must have all machines guarded when practicable, but such owners cannot employ a skilled and experienced superintendent or vice-principal to place guards on such machines when practicable, without becoming liable to such skilled and experienced superintendent or vice-principal if the latter loses an arm solely because he wrongfully
114 neglects to fulfil his contract of guarding a machine, without any fault on the part of the owner.

Appellant contends that such a requirement, making the owner, when not at fault, liable to the vice-principal who is the only one at fault, is not only unnecessary, but unreasonable.

Such a requirement, imposing a liability on the owner to such vice-principal is not necessary for the protection of any other employee in, or connected with, said establishment, as such owner is liable to them for the failure of the vice-principal to guard machinery.

Such a requirement is also "unreasonable" as it allows a person "to take advantage of his own wrong" by giving a cause of action to such vice-principal based on his own wrongful neglect to guard machinery, as he contracted to do, and gives him property of the

owner who has not violated his contract and who has fulfilled every duty he owes to such vice-principal, and when such vice-principal is the only person at fault.

The public welfare can be and is promoted without making the innocent owner liable to the guilty vice-principal, if the statute be construed and applied so as not to give a cause of action to such a vice-principal.

"This is not a question of substituting the judgment of the court for that of the legislature." (Lochner v. New York, 198 U. S. 45.)

"The 14th Amendment debars the states from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated 'public welfare,' and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment. * * * A statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power." (Coppage v. Kansas, 35 S. Ct. R. 245, supra.)

If it be "unreasonable" or "unnecessary" for the legislature to impose a statutory liability on the owner of a manufacturing establishment, who is not at fault, to his vice-principal who is the only person at fault and who receives an injury solely because of his own wrongful violation of his contract to guard machinery, when such contract is made with the owner in order that all other employees may be protected by such guards, or recover damages under said statute from such owner for the wrongful neglect of the vice-principal in not guarding machines, then such a provision of the statute, imposing such a liability on the owner to such vice-principal, "is not a legitimate police regulation" for it "is the very thing inhibited by the Amendment."

The effect of the decision of this court, in case at bar, is that the owner of a manufacturing plant is not entitled to show and have a jury consider facts which would prove or tend to prove that
116 the person injured by an unguarded machine was a vice-principal who had contracted to guard such machine for the owner, in order to comply with the state statute, and that such vice-principal was injured solely because of his own wrongful negligence, and a breach of his contract, without any fault on the part of such owner, who had fulfilled every duty he owed to such vice-principal.

Such a construction and application of the statute, on which the alleged cause of action of appellee is based not only takes the property of one person without his consent and without his fault, but gives such property to another man who is the only one at fault.

In referring to a class of statutes imposing upon railroad companies the duty to fence their right of way under which a liability

is imposed for failing to obey the command of such statutes, Black, in his work on Constitutional Law, 2d Ed., p. 351, says:

"But such statutes cannot go beyond the imposition of such a penalty in cases where the fault lies at the door of the company. If the law attempts to make such companies liable for accidents which were not caused by their negligence, or disobedience of the law, but by the negligence of others, or by uncontrollable causes, or does not give the company an opportunity to show facts in its own defense, it is void."

In case at bar appellant was deprived of the opportunity to have the jury consider positive evidence of these witnesses as to the authority and duty of the injured person, showing, or at least
117 strongly tending to show that such person was a vice-principal who was injured solely because of his own wrongful neglect to perform his contractual duty to appellant, and without any fault of appellant, who was thereby deprived of a legitimate defense according to Black on Constitutional Law.

In referring to a state of facts where the plaintiff and defendant were equally at fault, and acting in disregard of a statute, Brewer, J., in rendering the opinion of this court in Railroad Company v. Lea, 20 Kans. 366, wherein the railroad stock law of 1874, was construed and applied says:

"Two important questions arise: first, has the legislature the power, as between two parties equally guilty of negligence, to compel one to pay to the other all the damages resulting equally from their several wrongs or omissions? and second, did the legislature intend by these statutes to touch anything other than the acts or conduct of the railroad companies? Before a final decision of these questions, which seem to us of doubt as well as importance, we desire such assistance as will be furnished by a full examination on the part of careful and learned counsel.

For the reasons however heretofore given—that is, because each was knowingly acting in disobedience to the commands of a statute—we hold that the plaintiff cannot recover in this case; and the judgment must be reversed and case remanded, with instructions to enter judgment upon the findings in favor of the defendant below, plaintiff in error.

All the Justices concurring."

118 If there be any doubt as to the power of the legislature to compel a defendant to pay a plaintiff for all damages to plaintiff, when they are equally at fault, certainly there should be no doubt that a legislature has not such power when the plaintiff is the only person at fault.

In the case of O. & M. Ry. Co. v. Lackey, 78 Illinois, p. 55, an Illinois Statute, making railroad companies liable for all expenses of a coroner's inquest, and the burial of all persons who died on the cars, or who *was* killed by collision or other accident to such cars, was construed by the Supreme Court of that State, in an opinion rendered by Mr. Justice Breese, who said:

"An examination of the section will show that no default, or negligence of any kind, need be established against the railroad com-

pany; but they are mulcted in heavy charges if, notwithstanding all their care and caution, a death should occur on one of their cars, no matter how caused, even if by the party's own hand. Running of trains by these corporations is lawful and of great public benefit. it is not claimed that the liability attaches for a violation of any law, the omission of any duty, or the want of proper care and skill in running their trains. The penalty is not aimed at anything of this kind. We say penalty, for it is in the nature of a penalty, and there is a constitutional inhibition against imposing penalties where no law has been violated or duty neglected. Neither is pretended in this case, nor are they in the contemplation of the statute. A passenger on the train dies from sickness. He is a man of wealth. Why should his burial expenses be charged to the
119 railroad company? There is neither reason nor justice in it; and if he be poor, having not the means for a decent burial, the general law makes ample provision for such cases."

The New York Court of Appeals in the case of Ives v. Railway Co., 201 N. Y. 271, 94 N. E. 431, held that "the legislature may abolish the fellow-servant rule and the law of contributory negligence, as they apply to the question of liability of a master for injury to his servant"; but decided that the statute entitled "An Act to Amend the Labor Law in Relation to Workmen's Compensation in Certain Dangerous Employments" was an unconstitutional taking of liberty and property without due process of law, if the employer was not at fault. In rendering the decision the court says:

"The argument that the risk to an employe should be borne by the employer, because it is inherent in the employment, may be economically sound; but it is at war with the legal principle that no employer can be compelled to assume a risk which is inseparable from the work of the employe, and which may exist in spite of a degree of care by the employer far greater than may be exacted by the most drastic law. If it is competent to impose upon an employer who has omitted no legal duty, and has committed no wrong, a liability based solely upon a legislative fiat that his business is inherently dangerous, it is equally competent to visit upon him a special tax for the support of hospitals and other charitable intitutions, upon the theory that they are devoted largely to the alleviation of ills primarily due to his business. In its final and simple analysis that is taking the property of A and giving it to B; and that
120 cannot be done under our constitutions. Practical and simple illustrations of the extent to which this theory of liability might be carried could be multiplied ad infinitum, and many will readily occur to the thoughtful reader."

In case at bar, the injured person (Smith) was the sole cause of his own injury and appellant was not at fault, or at least, appellant was entitled to have the jury decide, whether such a state of facts was shown, as a defense, and the refusal of the trial court to give said instructions (2, 4, 5 and 6) deprived appellant of his constitutional rights of having the jury even consider such evidence, from which a verdict could have been rendered finding that appellant was not at fault or negligent, and that the said Sumner I. Smith

as vice-principal was killed solely because of his own wrongful neglect, in breaching his contract of employment by not safeguarding the machine on which he was killed, and that appellant had fulfilled every duty owing to said Smith.

Appellant earnestly contends that the said Kansas statute, as construed and applied by the court in case at bar, is in violation of said 14th Amendment to the United States Constitution, and deprives appellant of liberty to contract and deprives appellant of his property without due process of law, and as this question has been in the case from the beginning and has at all times been urged by the appellant and cannot be properly ignored we submit that the failure of this court to decide, or mention it in the opinion justly entitles the appellant to a re-hearing.

C. F. HUTCHINGS,
McCABE MOORE,
Attorneys for said Appellant.

121 Be it further remembered, that afterward on *the* Saturday, the 15th day of May, 1915, the same being one of the regular judicial days of the January Term, 1915, of the Supreme Court of the State of Kansas, before the said court in session at the Supreme Court room in the City of Topeka, the following proceeding, among others, was had and entered of record in the words and figures as follows, to-wit:

122 In the Supreme Court of the State of Kansas, Saturday, May 15, 1915.

No. 19371.

ADA BURHANS SMITH, etc., Appellee,
vs.
J. D. BOWERSOCK, Appellant.

Now comes on for decision the petition for a rehearing of this cause; and thereupon it is ordered that said petition for a rehearing be denied.

123 And thereafter, to-wit: on the 3d. day of June 1915, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas a petition for Writ of Error and which is attached hereto with the allowance thereof, and is as follows:

124 In the Supreme Court of the State of Kansas.

ADA BURHANS SMITH, Administratrix of the Estate of Sumner I. Smith, Deceased, Appellee,

vs.

J. D. BOWERSOCK, doing business as The Lawrence Paper Manufacturing Company, Appellant.

Petition for Writ of Error.

To the Honorable William A. Johnston, Chief Justice of the Supreme Court of the State of Kansas:

Now comes the above-named Appellant, and respectfully shows: That in the record and proceedings had in said cause of Ada Burhans Smith, Administratrix of the Estate of Sumner I. Smith, deceased, appellee, vs. J. D. Bowersock, doing business as The Lawrence Paper Manufacturing Company, appellant, in the Supreme Court of the State of Kansas, and also in the rendition of the judgment in the above-entitled cause in the District Court of Douglas County, in the State of Kansas, as shown by the record in said cause, manifest error has happened to the great damage of the said J. D. Bowersock, the defendant therein, and appellant in the said Supreme Court of the State of Kansas; that said error in the judgments of each and both of said State Courts consisted in the denial of rights and immunities expressly claimed and asserted by said defendant, (appellant), under that portion of the 14th Amendment to the Constitution of the United States, which reads as follows:

"Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny any person within its jurisdiction the equal protection of the laws,"

said denial, by each and both of said state courts, of said rights and immunities claimed by said appellant, being in holding and deciding that the statute of the state of Kansas commonly known as the factory Act, being Chapter 356, Laws of 1903, (General Statutes of Kansas, A. D. 1909, Sections 4676-4683) gave appellee a right of action against appellant for the death of Sumner I. Smith, and

125 in deciding that the verdict of the jury in said action for Ten Thousand ($10,000.) Dollars in favor of said Appellee and against said Appellant was valid and legal, and that under the evidence in said cause that there is nothing in the relation of said parties, or in the circumstances of the case to absolve Appellant from liability for the death of said Sumner I. Smith, which resulted from his failure to provide safeguards conceded to have been practicable and necessary to the safety of employees, and in the affirmance of the alleged rights claimed by said Appellee, under said Kansas Statute, to the prejudice of Appellant, when said alleged rights of said Appellee were controverted by said Appellant as being in violation of the 14th Amendment to the Constitution of the United States by taking property from Appellant, who was not negligent or at fault.

in any manner, and giving said property to Appellee, as the legal representative of said Sumner I. Smith, who was conceded to be the Superintendent of the manufacturing establishment, wherein he was killed solely because of his own wrongful negligence in not guarding a machine which by the terms of his employment he had obligated himself to guard, in order that said Kansas Statute would be complied with; that the judgments of said State Courts were based upon said Kansas Statute, which as construed, applied and put in operation and enforced by said State Courts was claimed by Appellant to be in violation of and repugnant to said 14th Amendment of the Constitution of the United States in that it deprives Appellant of property without due process of law, by taking his property, when he was not at fault in any manner and giving it to the representative (Appellee) of the only person who was at fault, and without giving appellant an opportunity to have the jury consider such a state of facts as a defense; and without permitting the jury, which rendered the verdict in said cause, to consider the contract of employment between Appellant and said Sumner I. Smith when he became Superintendent whereby said Sumner I. Smith obligated himself to guard all machinery where he was killed in the manufacturing plant owned by Appellant, and thereby deprived appellant of defenses in said action, to which he was and is entitled
126 under said 14th Amendment to the Constitution of the United States when properly construed and applied; and that the said Supreme Court of Kansas, in whose record and judgment the aforesaid errors appear, is the highest court of law or equity in the State of Kansas in which a decision could be had in said suit between the parties thereto aforesaid. And said Appellant shows that he drew in question the validity of said Statutes of the State of Kansas, as construed, applied and enforced by said state courts, on the ground that the same were repugnant to the 14th Amendment to the Constitution of the United States; that said final decision and judgment of the Supreme Court of the State of Kansas deprives Appellant of liberty and property without due process of law, contrary to said 14th Amendment to the Constitution of the United States, all of which will particularly appear from the record and proceedings in said case.

Wherefore, said defendant (J. D. Bowersock, Appellant) prays for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Kansas, and for an order fixing the amount of bond for supersedeas in said cause, and for such other orders and proceedings as may cause the manifest errors in said cause to be corrected by the Supreme Court of the United States of America.

J. D. BOWERSACK, *Appellant,*
By CHARLES F. HUTCHINGS,
J. McCABE MOORE,
His Attorneys.

Allowed at Topeka, Kansas, this 3rd day of June A. D. 1915.

W. A. JOHNSTON,
Chief Justice of Supreme Court of the State of Kansas.

[Endorsed:] 19371. Petition. Filed Jun- 3, 1915. D. A. Valentine, Clerk Supreme Court.

127 And thereafter on the 3d. day of June 1915, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas an order signed by the Chief Justice of the Supreme Court of the State of Kansas granting the petition for a Writ of Error, and allowing said Writ of Error, which order is attached hereto and is in words and figures as follows:

128 In the Supreme Court of the State of Kansas.

ADA BURHANS SMITH, Administratrix of the Estate of Sumner I. Smith, Deceased, Appellee,

vs.

J. D. BOWERSOCK, Doing Business as The Lawrence Paper Manufacturing Company, Appellant.

Order on Petition for Writ of Error.

Now on this 3 day of June A. D. 1915, there are presented to the Honorable William A. Johnston, Chief Justice of the Supreme Court of Kansas, in Chambers, a petition filed herein for a writ of error, and an assignment of errors filed herein and accompanying said petition of and by said appellant, praying for the allowance of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Kansas to review the final judgment and decision of the Supreme Court of the State of Kansas, heretofore rendered and made on the 10th day of April, A. D. 1915, in the above-entitled case, a citation directed to said appellee, citing and admonishing her to appear in the Supreme Court of the United States not exceeding thirty days from and after the day said citation bears date; which said petition for a writ of error is granted, which said writ of error is allowed, said citation signed, and an order of said chief Justice filed approving the writ of error bond in the sum of Twenty-two Thousand five hundred ($22,500.) Dollars, which said bond is also filed and which is to operate as a supersedeas and stay of execution.

[Seal Supreme Court, State of Kansas.]

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Filed the 3rd day of June A. D. 1915.

D. A. VALENTINE,
Clerk of Supreme Court of State of Kansas.

129 And thereafter, on the same day, to-wit: on the 3d. day of June 1915, there was filed in the office of the Clerk of the Supreme Court of Kansas a Writ of Error from the Supreme Court of United States and the order allowing same by the Chief Justice of the Supreme Court of the State of Kansas, and which are attached hereto as follows:

130 In the Supreme Court of the United States.

J. D. BOWERSOCK, Doing Business as The Lawrence Paper Manufacturing Company (Appellant), Plaintiff in Error.

VS.

ADA BURHANS SMITH, Administratrix of the Estate of Sumner I. Smith Deceased (Appellee), Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA,
District of Kansas:

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Supreme Court of Kansas before you, being the highest court of law and equity of the said State of Kansas in which a decision could be had in said suit between said J. D. Bowersock Appellan , and said Ada Burhans Smith, Administratrix of the Estate of Sumner I. Smith, Deceased, Appellee, wherein was drawn in question the validity of a statute of said State of Kansas, on the ground that said statute, as construed, applied, and enforced was repugnant to the Constitution of the United States, and more particularly the Fourteenth Amendment to said Constitution of the United States, and the decision was in favor of the validity of said State statute; and wherein was drawn in question the construction of a clause of the Constitution of the United States and more particularly Section 1 of the Fourteenth Amendment to the Constitution of the United States, and the decision was against the right, privilege and immunity specially set up or claimed by said J. D. Bowersock, appellant, (Plaintiff in Error) under said clause of said Amendment to the Constitution of the United States, a mani-

131 fest error hath happened to the great damage and prejudice of the said J. D. Bowersock, Plaintiff in Error, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected and full and speedly justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, then that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same in said Supreme Court at the City of Washington, in the District of Columbia, within

thirty days after the date hereof, in said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this 3d. day of June, in the year of our Lord One Thousand Nine Hundred and Fifteen.

[Seal of District Court, U. S., District of Kansas.]

MORTON ALBOUGH,
Clerk of the District Court of the United States for the District of Kansas.

Allowed at Topeka, Kansas, this 3d day of June A. D. 1915.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

Filed this 3d day of June A. D. 1915.

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

[Endorsed:] 19371. J. D. Bowersock, etc., Plff. in error, v. Ada Burhans Smith Adm'x etc., Def't in error. Writ of error. Original. Filed June 3, 1915. D. A. Valentine, Clerk Supreme Court.

132 And on said 3d. day of June, A. D. 1915, there was filed in the office of the Clerk of the Supreme Court of Kansas a Writ of Error Bond, which is in words and figures as follows, to-wit:

Copy.

133 In the Supreme Court of the State of Kansas.

ADA BURHANS SMITH, Administratrix of the Estate of Sumner I. Smith, Deceased (Plaintiff), Appellee,

vs.

J. D. BOWERSOCK, Doing Business as The Lawrence Paper Manufacturing Company (Defendant), Appellant.

Writ of Error Bond.

Know All Men by These Presents: That we, J. D. Bowersock, as principal, and The American Fidelity Company, of Montpelier, Vermont, as surety, are held and firmly bound unto Ada Burhans

Smith, Administratrix of the Estate of Sumner I. Smith, Deceased, in the sum of Twenty-two Thousand, five hundred ($22,500.) Dollars, to be paid to the said Ada Burhans Smith, as Administratrix aforesaid, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 29th day of May, A. D. 1915.

Whereas, lately on the 10th day of April A. D. 1915, in a suit pending in the Supreme Court of the State of Kansas, between Ada Burhans Smith, Administratrix of the Estate of Sumner I. Smith, Deceased, (Appellee) and the said J. D. Bowersock, doing business as the Lawrence Paper Manufacturing Company, Appellant, judgment was rendered against said Appellant, and said Appellant seeks to prosecute a Writ of Error to the Supreme Court of the United States, to reverse the said judgment rendered, in the aforesaid suit, by said Supreme Court of the State of Kansas.

Now Therefore, the condition of the above obligation is such, that if the above-named Appellant, (as Plaintiff in Error), shall prosecute said Writ of Error to effect, and answer all damages and costs that may adjudged if he shall fail to make good his said plea,
134 then the above obligation to be void, otherwise to remain in full force and effect.

[Seal American Fidelity Company, Montpelier, Vt.]

J. D. BOWERSOCK,
American Fidelity Company,
By BAYARD C. RICHARDSON,
Its Attorney in Fact.

Approved this 3d. day of June A. D. 1915.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

[Endorsed:] No. 19371. Ada Burhans Smith, Admini'x, Appellee, vs. J. D. Bowersock, Appellant. Copy. Writ of Error Bond.

135 And on said 3d. day of June A. D. 1915, there was also filed in the office of the Supreme Court of the State of Kansas an order of the Chief Justice of said Supreme Court approving said bond, as a supersedeas and granting said Writ of Error, which order is in words and figures as follows, to-wit:

136 In the Supreme Court of the State of Kansas.

No. 19371.

ADA BURHANS SMITH, Administratrix of the Estate of Sumner I. Smith, Deceased, Appellee,
vs.
J. D. BOWERSOCK, Doing Business as the Lawrence Paper Manufacturing Company, Appellant.

Order Approving Bond.

Now on this 3d day of June A. D. 1915, comes the above-named Appellant, and presents his petition for a writ of error in the Supreme Court of the United States, and his bond for a supersedeas in the sum of Twenty-two Thousand, five hundred ($22,500.) Dollars, and said writ of error is hereby allowed and said bond, which is to operate as a supersedeas, is hereby approved.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

Filed this 3" day of June A. D. 1915.

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

137 And on said 3d. day of June A. D. 1915, at the time of the filing of said petition for Writ of Error as aforesaid, there was also filed in the office of the Clerk of the Supreme Court of the State of Kansas an Assignment of Errors, which is attached hereto and is as follows:

138 UNITED STATES OF AMERICA, *ss:*

In the Supreme Court of the United States.

In the Supreme Court of the State of Kansas.

J. D. BOWERSOCK, Doing Business as the Lawrence Paper Manufacturing Company (Appellant), Plaintiff in Error,
vs.
ADA BURHANS SMITH, Administratrix of the Estate of Sumner I. Smith, Deceased (Appellee), Defendant in Error.

Assignment of Errors by Plaintiff in Error.

Now comes J. D. Bowersock, Appellant in the Supreme Court of the State of Kansas, and Plaintiff in Error, in a writ of error to

said Supreme Court of the State of Kansas from the Supreme Court of the United States, duly allowed in the above-entitled cause, and files herein the following assignment of Errors, which he will present to the Supreme Court of the United States and upon which he will rely in his prosecution of the writ of error issued, or to be issued, in this case from the United States Supreme Court to the Supreme Court of the State of Kansas, and he avers that the Supreme Court of the State of Kansas, being the highest court of law or equity of the State of Kansas in which a decision could be had in said suit, on the 10th day of April A. D. 1915, rendered a final judgment in said suit, which was duly entered of record affirming the judgment of the District Court of Douglas County, Kansas, for the sum of Ten Thousand ($10,000.) Dollars and costs of said suit, against said Appellant, the Plaintiff in Error, and in favor of said Appellee, the Defendant in Error, all as shown by the record and proceedings in this case. In the rendition of said judgment by said Supreme Court of the State of Kansas the following divers and manifest errors were committed by said Supreme Court of the State of Kansas to the great damage and prejudice of said Appellant and Plaintiff in Error, which are apparent on the face of the
139 record, and for the purpose of having the same reviewed, and said final judgment reversed and corrected in and by the Supreme Court of the United States, said J. D. Bowersock, Appellant, the Plaintiff in Error, makes the following assignment of errors:

I. The Supreme Court of the State of Kansas erred in rendering said final judgment affirming the finding and judgment of the District Court of Douglas County, Kansas, in and by which said Appellant, this Plaintiff in Error was adjudged to pay to said Appellee, the Defendant in Error the sum of Ten Thousand ($10,000.) Dollars and the costs of said suit.

II. The said Supreme Court of the State of Kansas erred in holding and adjudging that the said judgment rendered against said appellant by the District Court of Douglas County, Kansas, finding the said Appellant in said cause and Plaintiff in Error herein to be indebted to said Appellee and Defendant in Error herein, in the sum of Ten Thousand ($10,000.) Dollars and adjudging that said Appellant pay to said Appellee the said sum of Ten Thousand ($10,000.) Dollars and the costs in said suit, was a valid and legal judgment.

III. The said Supreme Court of the State of Kansas erred in holding that the District Court of Douglas County, Kansas, ruled correctly and that said trial court did not err in overruling the motion for a new trial filed by said Appellant in said District Court of Douglas County, Kansas.

IV. The said Supreme Court of the State of Kansas erred in not reversing the judgment of the trial court, to-wit: the District Court of Douglas County, Kansas, and in not giving to said Appellant, the Plaintiff in Error herein, his rights asserted and claimed by him under that portion of the Fourteenth Amendment to the Constitution of the United States which provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due

process of law, nor deny to any person within its jurisdiction the equal protection of the law."

140 V. The said Supreme Court of the State of Kansas erred in holding and adjudging that Sections 4676 to 4683 inclusive, of the General Statutes of Kansas 1909, the same being Chapter 356 of the Acts of the Legislature of the State of Kansas A. D. 1903, created a legal liability in favor of said Appellee against said Plaintiff in Error, under the evidence in said cause, and in neglecting and refusing to hold, decide and adjudge that said Kansas Statutes, as construed, applied, put in operation and enforced by said District Court of Douglas County, Kansas, in said cause, against said Plaintiff in Error, was not in conflict with that portion of the Fourteenth Amendment to the Constitution of the United States which provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

VI. The said Supreme Court of the State of Kansas erred in overruling and denying Appellant's petition for a re-hearing filed in said court, and likewise erred in refusing to reverse said cause without remanding and in refusing to enter judgment for Appellant on account of the matters aforesaid, and on the undisputed facts disclosed by the record.

VII. The said Supreme Court of the State of Kansas erred in refusing to hold on the undisputed facts disclosed by the record, the deceased, Sumner I. Smith, lost his life by reason of his own wrongful negligence without any fault or negligence of said Appellant, and that Appellee was not entitled to a judgment against said Appellant in said cause.

VIII. The said Supreme Court of the State of Kansas erred in sustaining and affirming the ruling of the District Court of Douglas County, Kansas, wherein said District Court refused to give an instruction to the jury, requested by Plaintiff in Error, who was Defendant in said District Court, which reads as follows:

"The jury is instructed that under the evidence in this case the plaintiff is not entitled to recover and your verdict must be for the defendant."

141 IX. The said Supreme Court of the State of Kansas erred in sustaining and affirming the ruling and action of the District Court of Douglas County, Kansas, wherein said District Court refused to give an instruction to the jury, requested by Plaintiff in Error, who was Defendant in said District Court, which reads as follows:

"The jury is instructed that before you are justified in rendering a verdict for the plaintiff, you must be satisfied by a preponderance of the evidence, that the exact negligence alleged in plaintiff's petition has been proven, and you are not authorized to speculate or guess, but must be satisfied from the evidence that the alleged injuries of the deceased, Sumner I. Smith, were due to and caused

by the negligence of the defendant as alleged in defendant's petition, and if you find that the alleged injuries resulting in the death of Sumner I. Smith *was* not caused by the negligence of the defendant herein, as alleged in plaintiff's petition, then the plaintiff has failed to establish her case, and your verdict should be for the defendant."

X. The said Supreme Court of the State of Kansas erred in sustaining and affirming the ruling and action of the District Court of Douglas County, Kansas, wherein said District Court refused to give an instruction to the jury, requested by plaintiff in Error, who was the Defendant in said District Court, which reads as follows:

"The jury is instructed that if they believe, from a preponderance of the evidence, that Sumner I. Smith, the deceased, was the superintendent in charge of the manufacturing plant of the defendant, having power to hire and discharge workmen, the direction and control of the machinery and the making of all necessary repairs and the placing of all necessary safeguards about the machinery, then the said Sumner I. Smith stood in the place of the defendant, J. D. Bowersock, and was a vice-principal, and cannot recover for his own negligence, if any, in failing and neglecting to place a guard on the machinery where he was injured, and your verdict should be for the defendant."

XI. The said Supreme Court of the State of Kansas erred in sustaining and affirming the ruling and action of the District Court of Douglas County, Kansas, wherein said District Court refused to give an instruction to the jury, requested by plaintiff in error, who was the Defendant in said District Court, which reads as follows:

"The court instructs the jury that if they believe from a preponderance of the evidence, that Sumner I. Smith had the control and operation of the machinery in defendant's mill, and had the power to employ and discharge men, and it was his duty to safeguard all machinery, then if he, the said Sumner I. Smith, neglected to safeguard said machinery at the point where he was injured and killed, she cannot recover, and under these circumstances you should find for the defendant."

XII. The said Supreme Court of the State of Kansas erred
142 in sustaining and affirming the ruling and action of the District Court of Douglas County, Kansas, wherein said District Court refused to give an instruction to the jury, requested by Plaintiff in Error, who was the defendant in said District Court, which reads as follows:

"The court instructs the jury that if they believe from a preponderance of the evidence that Sumner I. Smith had the control and operation of the machinery in defendant's mill, and had the power to employ and discharge men, and it was his duty to safeguard all machinery, then, if the said Sumner I. Smith failed and neglected to put up a guard at the place where he was injured, this was his negligence, and he cannot recover and your verdict must be for defendant."

XIII. The said Supreme Court of the State of Kansas erred in not upholding and sustaining the claim and contention of Appellant

in said court, that the said Kansas Statute on which, the alleged cause of action of Appellee was based, as construed, applied and enforced by the District Court of Douglas County, Kansas and affirmed by said Supreme Court was and is in conflict with and repugnant to that portion of the Fourteenth Amendment to the Constitution of the United States, which provides:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."

XIV. Said Supreme Court of the State of Kansas erred in deciding, holding and adjudging that under the evidence in said cause there is nothing in the relation of said parties to said suit, or in the circumstances of the case to absolve Appellant, Plaintiff in Error, from liability for the death of Sumner I. Smith, and likewise erred in sustaining the ruling and action of the District Court of Douglas County, Kansas, in its refusal to permit, or allow, the jury in said cause to consider the evidence introduced by said plaintiff in error showing, or at least strongly tending to show, that the said Sumner I. Smith was killed solely because of his own wrongful negligence, without any fault of said plaintiff in error, and because of the wrongful neglect of the said Sumner I. Smith to guard machinery and thereby perform the obligations of his contract of employment, entered into by him with said Plaintiff in Error, under the terms and conditions of which contract in order that said Kansas Statute
143 might be complied with, the said Sumner I. Smith, as superintendent and vice-principal, had obligated himself to guard all machinery when practicable, including the machine on which he was killed solely because he wrongfully neglected to place a guard thereon, without any negligence on the part of Plaintiff in Error, who performed every duty he owed to said Sumner I. Smith, thereby depriving Plaintiff in Error of a legitimate defense guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, by abrogating the contract of employment between said Sumner I. Smith and Plaintiff in Error, and taking property without due process of law from Plaintiff in Error, who was not at fault, and giving it to the representative of Sumner I. Smith, who was the only party at fault.

XV. Said Supreme Court of the State of Kansas erred in affirming the rulings and actions of the District Court of Douglas County, Kansas, in not allowing or permitting the jury, which rendered the verdict in favor of defendant in error against plaintiff in error, to consider the evidence introduced on behalf of plaintiff in error, proving, or at least tending strongly to prove, and from which evidence said jury could have found did prove that Sumner I. Smith, at the time he became superintendent of the manufacturing establishment of plaintiff in error in which he was killed without any fault or negligence of plaintiff in error, solely because he, Sumner I. Smith, had wrongfully neglected to place safe guards on the machine, which said Kansas Statutes (Chapter 356, laws of 1903),

provided should be safe-guarded, had agreed in his contract of employment with plaintiff in error, to safely guard, which rulings and action of said District Court of the State of Kansas erroneously deprived said plaintiff in error of the benefit of the binding and legal obligations of said Sumner I. Smith in said contract of employment entered into by and between said Sumner I. Smith and said plaintiff in error, and abrogated said contract of employment to the great prejudice of said plaintiff in error, who had fulfilled all the obligations of said contract on his part, and who, by said rulings and actions of said courts of the State of Kansas, was deprived, in said suit, of a valid defense, to which he was and is entitled under
144 the law of the land, and in violation of Section 1, Article Fourteen of the Amendment to the Constitution of the United States, which provides that no state shall deprive any person of a right to make such contracts, nor of his property without due process of law, and that any act of the legislature of a state which provides that machinery in factories must be safe-guarded when practicable, and which statute the highest court of the state construes, applies and enforces, in such a manner, as will not permit the owner of such a factory, when sued for damages for the death of a superintendent and vice-principal, to defend himself in such suit, by having the jury consider positive evidence showing, or strongly tending to show, and from which the jury could find did show: (1) that such superintendent and vice-principal was killed solely because of his own wrongful negligence, and (2) because such superintendent and vice-principal had failed to perform his duty of guarding a machine which under his contract of employment, he had obligated himself to safe-guard, in order that said state statute would be complied with, and (3) that such owner was not at fault, in any manner, and had performed all of his obligations of the said contract by which the said superintendent and vice-principal was employed, is unconstitutional and void to the same extent as if such act of the state legislature had expressly declared such defenses could not be interposed by the defendant owner in such suits, for, whether such a statute is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put in operation, and not from their proclaimed purpose.

For the foregoing judicial errors, and each of them, affecting the merits of said cause, appellant, (plaintiff in error) prays a reversal of the said judgment of the said District Court of Douglas County, Kansas, and the judgment of affirmance thereof by the Supreme Court of Kansas.

And the said J. D. Bowersock, as Plaintiff in Error, prays that the judgment aforesaid, for each of the errors aforesaid and for other errors in the record and proceedings in said cause, whereby he, the said Plaintiff in Error has been by said judgment de-
145 prived of his rights, privileges and immunities, and for each of the errors above assigned, be reversed, annulled and held for naught; and that he, the said Plaintiff in Error, be restored to all things which he has lost by reason of said judgment of the said

Supreme Court of the State of Kansas, and by the judgment of the said District Court of Douglas County, Kansas, affirmed thereby.

J. D. BOWERSOCK,
Plaintiff in Error,
By CHARLES F. HUTCHINGS AND
J. McCABE MOORE,
His Attorneys of Record.

[Endorsed:] 19371. Assignment of Errors. Filed June 3, 1915. D. A. Valentine, Clerk Supreme Court.

146 And thereafter, to-wit: on the 5th day of June A. D. 1915, there was also filed in the office of the Clerk of the Supreme Court of the state of Kansas, the original Citation, with acceptance of service thereof, and which is hereto attached as follows:

147 In the Supreme Court of the State of Kansas

ADA BURHANS SMITH, Administratrix of the Estate of Sumner I. Smith, Deceased, Appellee,
vs.
J. D. BOWERSOCK, Doing Business as The Lawrence Paper Manufacturing Company, Appellant.

Citation.

The United States of America to Ada Burhans Smith, Administratrix of the Estate of Sumner I. Smith, Deceased, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at Washington, D. C., not exceeding thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the Clerk's office of the Supreme Court of the State of Kansas, wherein the said J. D. Bowersock is plaintiff in error, and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William A. Johnston, Chief Justice of the Supreme Court of Kansas, this 3d day of June, A. D. 1915.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of the State of Kansas.

Attest:

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court.

We, and each of us, acknowledge due and legal service of the foregoing Citation, this 3rd day of June, A. D. 1915.

S. D. BISHOP,
J. H. MITCHELL,
Attorneys for Defendant in Error.

Filed this 5th day of June, 1915.

D. A. VALENTINE,
Clerk of Supreme Court of the State of Kansas.

[Endorsed:] 19371. Ada Burhams Smith, Admr'x, etc., appellee, v. J. D. Bowersock, etc., appellant. Citation. Issued June, 3", 1915. Filed Jun- 5, 1915. D. A. Valentine, Clerk Supreme Court.

148 STATE OF KANSAS,
Supreme Court, ss:

I, D. A. Valentine, Clerk of the Supreme Court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of all the pleadings and papers filed, and of all the proceedings had in the above entitled cause including the opinion of the court rendered therein, as the same were entered and now appear of record and on file in my office.

Witness my hand and the seal of the Supreme Court of the State of Kansas, hereto affixed at my office in the City of Topeka, this 8th day of June, 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk Supreme Court of the State of Kansas.

149 In the Supreme Court of the State of Kansas.

No. 19371.

ADA BURHANS SMITH, Administratrix of the Estate of Sumner I. Smith, Deceased, Appellee,
vs.
J. D. BOWERSOCK, Doing Business as The Lawrence Paper Manufacturing Company Appellant

I, D. A. Valentine, Clerk of the said Court, do hereby certify that there was lodged with me as such Clerk on the 3d day of June A. D., 1915, in the above-entitled cause, the original bond of which a copy is set forth.

Two copies of the writ of error as herein set forth, one being for said Appellee, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed

the seal of said court at my office in Topeka, Kansas, this 8th day of June A. D. 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

150 UNITED STATES OF AMERICA,
Supreme Court of the State of Kansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, the complete transcript of the entire record with all things touching the same as appears from the records and files of my office in the case of Ada Burhans Smith, Administratrix of the Estate of Sumner I. Smith, Deceased, Appellee, Defendant in Error, vs. J. D. Bowersock, doing business as the Lawrence Paper Manufacturing Company, Appellant, and Plaintiff in Error.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Supreme Court of Kansas, in the City of Topeka, this 8th day of June A. D., 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Fee for this transcript $5.70.

Endorsed on cover: File No. 24,805. Kansas Supreme Court. Term No. 172. J. D. Bowersock, plaintiff in error, vs. Ada Burhans Smith, administratrix of the estate of Sumner I. Smith, deceased. Filed June 19th, 1915. File No. 24,805.

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(24,805)

SUPREME COURT OF THE UNITED STATES

October Term, 1916.

No. 172.

J. D. BOWERSOCK, *Plaintiff in Error,*
vs.
ADA BURHANS SMITH, *Administratrix of the Estate of Sumner I. Smith, Deceased.*

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF ADA BURHANS SMITH, ADMINISTATRIX OF THE ESTATE OF SUMNER I. SMITH, DECEASED, IN ANSWER TO REPLY BRIEF OF PLAINTIFF IN ERROR

IT IS CONCEDED BY PLAINTIFF IN ERROR THAT IT WAS PRACTICABLE TO GUARD THE ROLLS THAT CAUSED THE DEATH OF SUMNER I. SMITH.

Plaintiff in error, in his reply brief at page 2 says, "but the jury, by a general verdict, found the use of a guard *was*

'Practicable' and that question of fact was eliminated from this case and has no bearing on the legal question involved as to the constitutionality of the statute, as *construed* and *enforced* by the courts of the state of Kansas."

This being conceded, the whole theory upon which plaintiff in error relied in the trial court and upon appeal to the Supreme Court of the state of Kansas is abandoned. It being conceded that it was practicable to guard the machinery, then under the Factory Act of Kansas, it was the duty of J. D. Bowersock, and him only, to guard this machinery and to see that it was not put in operation until it was guarded. It was a duty that could not be delegated to his manager, assistant manager, superintendent or any other person employed or laboring in his establishment, and he could not by any contract entered into with any of his inferiors, shift the responsibility.

PLAINTIFF IN ERROR RELIES UPON THE ALLEGED CONTRACT WITH SUMNER I. SMITH TO SAFEGUARD THE MACHINERY.

In his reply brief, page 4, plaintiff in error says,

"That the positive and uncontradicted evidence of three witnesses, J. D. Bowersock, Irving S. Hill and Paul Dinsmoor, shows conclusively that under the contract of Sumner I. Smith, by which he became superintendent of said paper mill, he was to safeguard the machinery when 'practicable'; that on account of his skill and experience his judgment controlled as to when the use of a guard was 'practicable'.

As to the existence of such a contract between the plaintiff in error and Sumner I. Smith, the defendant in error had no evidence to introduce contradicting the testimony of J. D. Bowersock or his manager or his assistant manager. If any such contract existed, it was not in writing. The manager, the assistant manager and Mr. Bowersock were in court and

testified. According to their testimony, they retained the authority over Mr. Smith, and it was admitted by Mr. Dinsmoor, the assistant manager, that he had the power to discharge Mr. Smith if he refused to comply with what he, Mr. Dinsmoor, thought right or necessary even including the guarding of the machinery. But if the defendant in error did not have evidence contradicting the existence of the alleged contract between the managers of the paper mill and Sumner I. Smith, the plaintiff in error furnished written evidence sufficient to contradict the oral evidence of Messrs. Bowersock, Hill and Dinsmoor in reference to the existence of a contract. Job said "My desire is * * * * * * that mine adversary had written a book." J. D. Bowersock did not write a book but he wrote a placard which read as follows

"CAUTION

Every Employee is Urged To Be Careful in Order to Avoid Accidents.

If there is any machinery, dangerous place or tool that you think should be safeguarded, repaired, or improved, we will regard it a favor if you will report same at once to the office. It is desired that all employees assist in reducing accidents to the lowest possible point.

Nov. 1911. W

BOWERSOCK MILL & POWER CO.
LAWRENCE PAPER MFG. CO.
LAWRENCE IRON WORKS.
GRIFFIN ICE CO."

This placard did not request the employees to report to Sumner I. Smith, the superintendent, but to report at once to the office. If Sumner I. Smith were given the power to see that the machinery was guarded, why should the employees report to the office? Is not the reasonable inference that if any employee had reported to the office that a ma-

chine needed guarding, would not Mr. Bowersock have ordered that machine guarded either by Mr. Smith or the workman who operated the machine, if, in his opinion, the machine needed guarding. In the writing and posting of this placard, Mr. Bowersock recognized his personal responsibility to all employees of that factory to have the machinery guarded, a responsibility that he knew he could not shift to anyone else.

THE DECISIONS CITED BY PLAINTIFF IN ERROR IN HIS REPLY BRIEF ARE NOT APPLICABLE TO THE FACTS IN THIS CASE.

In the cases cited by plaintiff in error, namely, Ochoa vs. Morales, 230 U. S. 139; Chicago B. etc. R. R. vs. Chicago, 166 U. S. 226, 17 Sup. Ct. R. 581; Empire State Cattle Company vs. A. T. & S. F. R. Company, 210 U. S. 1, 28 Sup. Ct. R. 609; and St. Louis I. M. & S. R. Company vs. Taylor, 210 U. S. 281, 28 Supt. Ct. R. 620, *the question of the health, safety or morals of the employees of the public is not involved.* Plaintiff in error lays great stress on the decision of this Court in the case of Chicago R. I. & Pac. Ry. Co. vs. Bond, administrator of the estate of William L. Turner, 240 U. S. 449, 36 Sup. Ct. R. 403. In that case, Turner, the deceased, was an independent contractor and not an employee of the Railroad. Turner had entered into a contract with the railroad company in which he was to furnish all labor necessary to handle the coal required by the Company at Enid, to break the coal to the necessary size and to do certain other necessary work designated in the contract. Turner was named as principal contractor, and was to receive a stipulated price for work performed under the contract. He hired the men, paid them and

discharged them. They were working for him and not for the railroad company, and he was no more an employee of the railroad company than any independent contractor would have been who entered into a contract with a railroad company to build a switch, construct a depot or lay a section of track, and it is certainly straining the law, as laid down in that case, to make it applicable to the facts in this case arising under the Factory Act of the state of Kansas.

The case Lochner vs. N. Y. 198 U. S. 45, cited by plaintiff in error at page 17 of his reply brief, is relied upon by him as sustaining his position. In that case, the Court held that the law of the state of New York, fixing an eight hour day for bakers as applied to that particular occupation, was not a law affecting the health, safety or morals of either the employees or public, and for that reason did not come within the police power of the state. It is very apparent that a law fixing the hours which a person laboring in a bake shop might not apply to a law providing for the safeguarding of dangerous machinery in a manufacturing establishment, operating dangerous machinery and large rolls into which an employee might be drawn and seriously injured or killed.

In the Lochner case, supra, the Court held that the law of the state of New York, fixing an eight hour day, did not affect the health, morals or safety or the employee or public. It is very apparent from a careful reading of that law, that none of these objects was the motive of it. The Kansas Factory Act was a law passed for the sole and only purpose of insuring the safety of any person employed or laboring in a manufacturing establishment, and for that reason, we con-

tend that the law laid down in the Lochner case does not apply to the facts in this case.

Another case relied upon by the plaintiff in error is Lawton vs. Steele, 152 U. S. 133. That case involved the question of the enforcement of the *game and fish laws of the State of New York,* and providing for the destruction of any net, pound, etc. for taking or capturing fish. The Court in discussing the police power of the state, says, "That it is universally conceded to include everything essential to the safety, health and morals and to justify the destruction or abatement of summary proceedings of whatever may be regarded as a public nuisance."

The Factory Act of the state of Kansas does not "impose unusual and unnecessary restrictions upon lawful occupations" but it does impose necessary restrictions to insure the safety of employees, and we contend that the law as laid down in the case of Lawton vs. Steele applying to the fish and game laws of a certain state and its enforcement has no bearing whatever on this case under the Factory Act of the state of Kansas.

Neither the case of Wilmington Rld. Co. vs. Alsbrook, 146 U. S. 279, nor Myles Salt Co. vs. Board of County Commissioners, et al, 239 U. S. 478 are in point.

The latter case arose over the taxation of land included within a drainage district which was not benefited thereby, and which was included for the sole purpose of levying a tax thereon for the benefit of other land improved by drainage. The facts in that case are as foreign to the facts in the case at bar as they could possibly be, and for plaintiff in error to try to apply the rule as laid down in the Myles case to the one at bar is certainly preposterous.

The last case cited by plaintiff in error in his brief, at page 22, is that of Poindexter vs. Greenhow, 114 U. S. 288. In this case, the state of Virginia issued bonds and coupons. The coupons providing as follows, "Receivable at and after maturity for all taxes, debts and demands due the state." Afterwards, the state passed a law providing that the taxes should be paid in gold, silver, United States treasury notes, national bank currency and nothing else, and of course, this Court held that such law was unconstitutional. But how the rule as laid down to meet the facts in that case could by any construction be made to apply to the facts in this case, is beyond our comprehension.

On page 14 of the reply brief of plaintiff in error, referring to the scope and effect of the Factory Act of the State of Kansas, plaintiff in error says, "The State of Kansas has not imposed any such obligation, duty or liability upon any corporation which owns a paper mill because no corporation can itself guard machinery."

In reply thereto, we say that the invisible and intangible being itself called a corporation, perhaps having no earthly existence, could not itself guard the machinery but the managing officers or board of directors of said corporation could personally guard the machinery and could personally see that said machinery was properly guarded before the machinery was put in use and operation. And one of the objects of the Factory Act of the State of Kansas is to compel corporations, through their board of directors or managing officers to see that all machinery used in the manufacturing establishment was properly and safely guarded in order to diminish the frightful loss of life and limb of the persons employed in such institutions. If corporations fail to perform

this duty in this state, they do so at their peril. Further argument on this proposition is unnecessary.

Respectfully submitted,

ADA BURHANS SMITH, *Administratrix of the Estate of Sumner I. Smith, Deceased, pro se.*

J. H. MITCHELL,

S. D. BISHOP,

JOSEPH TAGGART,

Of Counsel.

Supreme Court, U. S.
FILED
JAN 23 1917
JAMES D. MAHER
CLERK

No. 24805.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 172.

J. D. BOWERSOCK, PLAINTIFF IN ERROR,

VS.

ADA BURHANS SMITH, ADMINISTRATRIX OF THE ESTATE OF SUMNER I. SMITH, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

REPLY BRIEF OF PLAINTIFF IN ERROR.

CHARLES F. HUTCHINGS and
McCABE MOORE,
Attorneys for J. D. Bowersock, Plaintiff in Error.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

REPLY BRIEF OF PLAINTIFF IN ERROR.

I.

The fact that the use of a guard was "practicable" has no bearing on the legal questions involving the constitutionality of the statute as construed, applied and enforced, in case at bar, by the courts of Kansas.

In brief of defendant in error page 5 it is stated:

"Plaintiff in Error introduced at the trial of the case a large amount of expert testimony to show

> (a) that it was not practicable to guard or screen the particular machinery which caused the death of Sumner I. Smith; (b) that it was dangerous to the machine tender and it hindered him in the performance of his work to have this particular machinery guarded or screened; (c) that other paper mills did not guard or screen this particular machinery."

In said brief of defendant in error (page 12) it is also stated:

> "Plaintiff in error and his managers must have believed at that time, according to their own testimony and the testimony of their experts that it was not only *impracticable* to guard this machinery, but also believed that the *safeguarding* of the same would make it *more dangerous* for the machine *tender* to operate the machinery."

The above statements are correct and true; but the jury, by a general verdict, found the use of a guard *was* "practicable" and that question of fact is eliminated from this case and has no bearing on the legal questions involved as to the constitutionality of the statute, as *construed* and *enforced* by the courts of the state of Kansas.

Plaintiff in error did not "believe" the use of a guard was "practicable" because he had entered into a contract with an expert on the *practicability* of guards by which contract said expert (Sumner I. Smith) was paid for his superior knowledge as to when the use of a guard was "practicable," and when said Sumner I. Smith (who was superintendent of the paper mill, in absolute control of all the details, "as if he were the owner") failed to guard the machine, which he was "adjusting," and received a salary for guarding all machinery if practicable, we con-

tend that plaintiff in error was justified in *believing* that the use of a guard on the machine, where said Sumner I. Smith was killed, was not "practicable."

Said plaintiff in error had a right to "believe" that if a guard were "practicable," said Sumner I. Smith would have used a guard, as he was in duty bound to do under the terms of his contract by which he became superintendent of said paper mill.

Plaintiff in error relied on the superior judgment and experience of said superintendent, Sumner I. Smith, to guard the machinery if "practicable" and when said Sumner I. Smith did not guard the machine as he had contracted to do when practicable, plaintiff in error was justified in alleging in his answer that the use of a guard was not "practicable." A defendant may claim several different defenses, to an alleged cause of action, if such defenses are not inconsistent with each other.

But, as the machine was not guarded and the jury, by a general verdict, found that it *should* have been, the question as to whether a guard was "practicable" ceased to be an issue in this case, and has no bearing on the legal questions now involved as to whether or not the Kansas statute, as *construed, applied* and *enforced* by the Kansas *courts,* deprives plaintiff in error of a defense given him by the Constitution of the United States and takes his property from him when *he was not at fault* and gives it to the representative of *Sumner I. Smith,* the *only person who was at fault,* and who was killed solely because he failed to fulfill his contractual obligations to plaintiff in error by not guarding the machine.

II.

The contention made in brief of defendant in error: "That there was no contract in the employment of Mr. Smith to the effect that he was to safeguard the machinery," is without any merit, and is contrary to all the evidence on that subject.

In said brief of defendant in error (page 9), it is stated as follows:

> "The facts detailed and the statute quoted herein, present to the court the following questions:
>
> 1. Was the *duty*, under the facts and law, to safeguard the machinery, or screen the same, located in the papermill of plaintiff in error, cast upon *Sumner I. Smith*, or was it the duty of *plaintiff in error*."

In said brief of defendant in error (page 14) it is also stated as follows:

> "We think that the *evidence* in this case shows conclusively, that there was *no contract* in the employment of Mr. Smith to the effect that he was to safeguard the machinery."

In reply to the above contention, plaintiff in error contends:

That the positive and uncontradicted evidence of three witnesses, J. D. Bowersock, Irving S. Hill and Paul Dinsmoor, (Rec. pp. 26-33), shows conclusively that *under the contract* of Sumner I. Smith, *by which he became* superintendent of said paper mill, he *was* to *safeguard* the *machinery* when "practicable;" that on account of his skill and experience *his* judgment controlled as to when the use of a guard was "practicable" (Rec. p. 33);

that "so far as the operation of the mill was concerned, the *superintendent* has *absolute* control" (Rec. p. 32); that he (Smith) had charge of the men, the right to employ and discharge men, the operation of the machinery and its ordinary alteration and repair, the *safeguarding* of machinery, fire protection, and the *entire charge of the mill,* with the exception of improvements involving the expenditure of additional money for *new* machinery, (Rec. p. 27); that in making his contract, by which he became superintendent, he stated that if he became superintendent of said mill, he "didn't want it to be a case of there being three or four bosses:" and it was then agreed that he, as superintendent, "would have *full charge* of the grounds, the building, the *machinery* and the men * * * and to run the plant generally as if he were the owner; that this included all the methods of the manufacture of the paper, the *care* of the *machinery,* the *safeguarding* of the *machinery,* * * * in short that *he* was to be in *full charge* of the *plant*" (Rec. p. 30).

If the positive evidence of said three witnesses is contradicted by any other witness, we fail to find it in the record of this case, and confidently claim that the testimony of said three witnesses, is all that was introduced in the trial of said cause, on the contract of said Sumner I. Smith by which he became superintendent and by which *he* owed *to plaintiff in error* the *duty* of *safeguarding* machinery when "practicable."

We contend that the testimony of said three witnesses showed *conclusively* that plaintiff in error, J. D.

Bowersock, did *not* owe to *Sumner I. Smith* the duty of *safeguarding* machinery, because under his contract said *Smith owed that duty* to said J. D. Bowersock; and that the peremptory instruction requested by plaintiff in error for a verdict in his favor (Rec. p. 41) should have been given by the trial court, as claimed by plaintiff in error in assignment of error No. VIII, (Rec. p. 70).

But, even if said evidence did not *conclusively* show that *Sumner I. Smith* under his contract with plaintiff in error, owed *to said plaintiff in error* the *duty* of *safeguarding* machinery when "practicable," said evidence certainly *tended very strongly* to show that said Sumner I. Smith was in duty bound, by his contract with plaintiff in error, to *safeguard* the machinery and the jury could and probably would have so found if the evidence on that subject had been submitted to the jury, as requested by instructions No. 2, 4, 5 and 6 (Rec. pp. 41-2); and the refusal of the court to allow the jury to consider said evidence was error prejudicial to plaintiff in error as claimed in Assignments of Error Nos. IX to XV, inclusive, (Rec. pp. 79, 82),

The Kansas court permitted the introduction of evidence showing that Sumner I. Smith had contracted to guard the machinery and that he was killed because the machine was not guarded; but refused to allow the jury to *consider* the evidence which showed *he* was *under* a contractual *duty to plaintiff in error to safeguard* the *machine* and that *plaintiff in error* did *not* owe that *duty* to *Sumner I. Smith,* thus depriving plaintiff in error of an opportunity to have the jury consider facts from which

the jury could have found the *plaintiff in error was not at fault* and that Sumner I. Smith was, therefore, killed *solely* because of *his own fault.*

Due process of law inhibits the taking of one man's property and giving it to another "without an opportunity for a hearing" (*Ochoa* v. *Morales,* 230 U. S. 139).

A statute may impose a liability on a person for failing to comply with its commands; but if the statute does not give such person an opportunity to show facts in his own defense, it is void.

Likewise, if the statute be silent on such matters and the court construes and enforces the statute in such a manner as not to give a person an opportunity to show facts in his own defense, then such statute so enforced is void.

In deciding whether a state, by its legislature, its courts, or any other agency, ignores the Fourteenth Amendment to the United States Constitution, we must look to the *substance* and *not to* the *form* of the proceeding.

In *Chicago, B., etc., R. R.* v. *Chicago,* 166 U. S. 226, 234, 17 Sup. Ct. 581, 584, this court said:

> "A state may not, by any of its agencies, disregard the prohibitions of the Fourteenth Amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that amendment. In determining what is due process of

> law, regard must be had to substance, not to form. This court, referring to the Fourteenth Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' "

In case at bar, though the Kansas court allowed plaintiff in error to introduce in evidence facts showing *he was not at fault,* and that Sumner I. Smith was killed on account of his *own* wrong; yet the "final action" of said Kansas court in refusing to allow the *jury* to *consider* that evidence and then instructing the jury that such facts constituted no defense, deprived plaintiff in error of a valid defense which the Fourteenth Amendment to the United States Constitution gives to him by declaring "Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person the equal protection of the law."

A statute which expressly provides, *or* which is so *construed* and *enforced* by the *courts,* that a person is not allowed to exculpate himself, by proof of the most watchful vigilance, and which *conclusively presumes* any *question* of *fact* or *liability* against him and deprives him of an opportunity to show he is not at fault, "falls short of due process of law."

Even if the peremptory instruction requested by plaintiff in error was rightfully refused by the court on the theory that the evidence did not *conclusively* show Sumner I. Smith had *contracted* to *guard* the *machinery;*

still plaintiff in error had the right to ask other instructions relating to the same questions of fact even if the evidence had been conflicting (*Empire State Cattle Co.* v. *A. T. & S. F. R. Co.*, 210 U. S. 1, 28, Sup. Ct. R. 609).

The refusal of the trial court to give said requested instructions, and the affirmance of the judgment by the highest court in the state of Kansas, raises questions which are reviewable by this court (*St. Louis, I. M. & S. R. Co.*, v. *Taylor*, 210 U. S. 281, 28 Sup. Ct. R. 620).

Regardless of the decision of the state court that there was no contractual obligation of Sumner I. Smith to guard machinery, and that there was nothing *in* the *relations* of the parties, or the circumstances of the case which took Smith out of the protection of the act, or absolved plaintiff in error from liability for the death of said Smith, we contend that it is the "duty of *this* court to *determine for itself* the *existence* or *non-existence* of a contract," and consequently whether there was anything in the *"relations"* of the parties which took Sumner I. Smith out of the protection of the statute.

In the case of *Attorney General of the State of Michigan* v. *Lowry, et al.*, 189 U. S. 233, 26 Sup. Ct. R. 27, the defendant in error contended the decision of the state court did not involve a *Federal question*, "because the state court rests its conclusion of the *non-existence* of the *contract* upon a construction of the *state* constitution and laws." To which contention that there was no Federal question the court says:

> "This, however, overlooks the *power* and *duty* of *this* court to *determine for itself* the existence or *non*-existence of a *contract.*"

Likewise in the case at bar, though defendant in error, on page 14 of her brief, says:

> "The *evidence* in this case above shows conclusively, that there was *no contract* in the employment of Mr. Smith to the effect that *he* was to *safeguard* the machinery,"

we feel confident that when this court examines the uncontradicted and positive evidence of witnesses, Bowersock, Hill and Dinsmoor (Rec. pp. 26-32), heretofore referred to and quoted, that this court will decide that there *was* a *"contract* in the *employment* of Mr. Smith to the effect that *he was* to *safeguard* the *machinery."*

We also contend, on behalf of plaintiff in error that, upon an examination of the evidence, this court will find there *is* something "in the *relation* of the parties, or the circumstances of the case," which absolved plaintiff in error from liability for the death of said Sumner I. Smith. He had full charge of the operation of the paper mill and all of its *details.* He operated the plant "as if he were the owner" and was to *guard* the *machinery* (Rec. p. 30). Plaintiff in error did not direct him in *detail* as to *how* he performed the terms of his contract.

Plaintiff in error had control "over *results only*" and not *how* the work should be done. The "relation" of Sumner I. Smith to plaintiff in error was similar to the relation of Turner to his employer in the case of *Chicago, R. I. & P.' R. Co.* v. *Bond, Administrator of*

the Estate of Wm. L. Turner, 240 U. S. 449, 36 S. Ct. R. 403, wherein this court reversed the judgment of the lower court because the *"relation"* of Turner to his employer was different from what the lower court decided it was. In rendering the decision of this court Mr. Justice McKenna says:

> "The determining question is the *relation* in which Turner stood to the company. * * *
>
> "The railroad company, therefore, did not retain the right to direct the *manner* in which the business should be done as well as the *results* to be accomplished, or in other words did not retain control not only of what should be done, but *how* it should be done."

So in case at bar, the evidence shows that Sumner I. Smith was in "absolute control" of the operation of the paper mill (Rec. p. 32); "that the operation of the mill was entirely in his charge" (Rec. p. 30), and the *safeguarding* of machinery; that "as to *details* and the manufacture of the paper" plaintiff in error had "nothing to do with it" (Rec. p. 27).

Such was the status of the evidence when the court refused to give said peremptory instruction (No. 1, Rec. 41) requested by plaintiff in error for a verdict in his favor; and when instructions Nos. 2, 4, 5 and 6 (Rec. pp. 41-2), based upon and applicable to said evidence was requested by plaintiff in error, which would have allowed the *jury* to find a verdict in favor of plaintiff in error, if the jury had been permitted to consider said evidence.

III.

Plaintiff in error concedes that the Legislature may abolish the fellow-servant rule and the law of contributory negligence; but if an employer is not at fault, or negligent, then there is no negligence to which any one can "contribute."

A person injured *solely* because of his *own* negligence does not "contribute" to his injury, but he is the sole cause of his injury and the question of "contributory" negligence is not involved in any manner. Neither is the fellow-servant rule involved in case at bar.

The only questions are: was Sumner I. Smith killed by any wrong on the part of *plaintiff in error*, or by any failure of duty which plaintiff in error owed to the said Sumner I. Smith, or was he killed because of his *own failure* to fulfill *his* contractual *duty* of guarding the machine? If *he* was the *sole cause* of his *own injury* then plaintiff in error *cannot* be made liable by any legislative enactment.

IV.

The Kansas Statute as construed, applied and enforced by the Kansas courts in case at bar denies to plaintiff in error the "equal protection of the law," because said statute cannot be applied and enforced in the same manner if the owner of a manufacturing establishment be a corporation.

A corporation, as owner of a paper mill, cannot be brought within the rule as laid down by the Kansas Supreme Court in case at bar which held that it was the duty of J. D. Bowersock, as owner, to guard the ma-

chinery "and if he fails in his duty in this respect he will become liable for the injury and death of * * * a superintendent of a factory, * * * and, this although the superintendent was authorized to *direct* and *control* the details of the business" (Rec. p. 55).

The trial court instructed the jury as follows:

> "The next question that will challenge your attention is, what was the duty of Mr. Bowersock touching these two rolls. As to that I have to advise you that it was his duty, if it were practicable to do so, to properly and safely guard these two rolls in order to prevent injury to the deceased," Sumner I. Smith (Rec. p. 47); and "the fact that he (Sumner I. Smith) was superintendent of this establishment, * * * with authority to repair and *safeguard* machinery, will *not* constitute a *defense* in this action" (Rec. p. 47).

The above instruction and ruling of the court entirely ignored the *contract* of said Sumner I. Smith by which *he obligated himself to J. D. Bowersock* to *safeguard* the *machinery*. The jury was told that Sumner I. Smith did *not* owe to J. D. Bowersock the duty of guarding the machinery, though he had obligated himself by contract to do so and received pay from J. D. Bowersock for that purpose.

Such is the *operation* and *effect* of the said Kansas statute as *applied* and *enforced* by the *courts* of that state in case at bar. J. D. Bowersock is required to personally guard the machinery when "practicable" or be held liable in damages to an expert and experienced man like Sumner I. Smith who obligated himself by contract to per-

form that duty and who is injured solely because he fails to fulfill his obligation to said J. D. Bowersock.

The state of Kansas has not imposed any such obligation, duty and liability on any *corporation* which owns a paper mill, because no corporation can, *itself*, guard machinery.

A corporation necessarily is compelled to enter into some kind of a contract with a human being to safeguard machinery and the *corporation* is *not liable in* damages for personal injury *to* such *human being* if injured because the machine is *not* guarded. Neither the legislature nor the courts of the state has imposed such a liability on a corporation.

> *"The state has passed no such law, for it cannot; and what it cannot do, it certainly, in contemplation of law, has not done"* (*Poindexter* v. *Greenhow*, 114 U. S. 288, 5 S. C. R. 903).

It will thus be seen that the *operation* and *effect* of said Kansas statute, as *applied* and *enforced* by the state *court* denied J. D. Bowersock the "right to contract" with Sumner I. Smith by which said Smith was to take full charge of the paper mill and operate it "as if he were the owner," and by which contract said Smith, an expert superintendent, was in duty bound to *guard* machinery when practicable; and yet, a *corporation*, which is the owner of the *same kind* of a paper mill, is necessarily given the right to make the *same kind of a contract*, for a corporation, itself, cannot possibly *guard* a machine and must, therefore, contract with some natural person who

will perform that duty, which in case at bar the state court has decided must be performed by J. D. Bowersock.

The statute as construed, applied and enforced, in case at bar, deprives J. D. Sowerbock of valuable rights which are necessarily given to *corporation owners* of paper mills. "Equal protection of the law" requires that J. D. Bowersock, as owner of a paper mill, be given the same right to resort to the courts of the country on the same terms as a *corporation* owner and to be "exempt from any greater burdens than such are equally imposed upon all others under like circumstances. This equal protection forbids unequal exactions of *any* kind."

To use the language of the Supreme Court of Alabama in the case of *Smith* v. *L. & N. R. Co.*, 75 Ala. 450.

> "There must be no discriminations between *corporations* and *natural* persons in the matter of prosecuting or *defending* suits."

In referring to the subject above mentioned counsel for defendant in error (Brief p. 23) say:

> "We will admit that a corporation, being only a creature of the law, could not itself guard machinery, but the governing body of the corporation, either the stockholders at their regular meetings, or the Board of Directors, as the case might be, could require that all machinery must be guarded, and they could further see that no machinery was put in operation or use until it was guarded."

Conceding the above statement to be absolutely true and correct, the question arises; how can the "governing body of the corporation * * * require that all

machinery must be *guarded,*" unless some arrangement is made by contract, express or implied, with some natural person who agrees to perform that duty of guarding machinery?

The "governing body of the corporation," as the agent of the corporation, could "require that all machinery must be guarded" by contracting with some person to safeguard machinery; but if such person when "adjusting" a machine (as Sumner I. Smith was doing) was ininjured because he failed to guard a machine, as he contracted to do, the *corporation owner* would *not* be liable to him for his injury.

Likewise in case at bar after the agents of J. D. Bowersock (Hill and Dinsmoor) made a contract for J. D. Bowersock with Sumner I. Smith by which said Smith became superintendent of the paper mill and by which contract said Smith obligated himself to *guard* all machinery, and to operate the mill "as if he were the owner," J. D. Bowersock, who was not at fault, is not liable for the injury to said Sumner I. Smith who was killed solely because of *his own wrong* and failure of duty in not guarding the machine on which he was killed as he had contracted to do.

Under such a state of facts a *corporation* is *not* liable and neither can *J. D. Bowersock* be held liable without violating the equal protection of law clause of the Fourteenth Amendment to the United States Constitution.

V.

Said Kansas Statute as administered by the state courts is not a proper exercise of the police power and is in violation of the Fourteenth Amendment to the Constitution of the United States.

The Kansas Statute as written is not attacked but said statute as administered and justified by the highest court of the state violates the Federal Consitution and presents to this court a Federal question, (*Myles Salt Co.* v. *Board of County Comrs., et al.*, 239 U. S. 478) **and whether said statute is or is not repugnant to the said Constitution must be determined from the natural effect of such statute when put in operation, and not from its proclaimed purpose.**

Lochner v. *New York*, 198 U. S. 45.
Coppage v. *State of Kansas*, 236 U. S. 1.
Wilmington Rld. Co. v. *Alsbrook*, 146 U. S. 279.

> "The state cannot, under the guise of protecting the public interests arbitrarily interfere with *private* business, or impose unusual and unnecessary restrictions upon lawful occupations, in other words, its determination as to what is a proper exercise of its police powers is *not* final or conclusive, but is *subject* to the *supervision* of the *courts*."

Lawton et al. v. *Steele*, 14 S. C. R. 501, 152 U. S. 133.

In brief of defendant in error (p. 24) it is claimed this court has held "that legislation similar to the Factory Act of the State of Kansas is not in conflict with the Fourteenth Amendment to the Constitution of the United States," and in support of such claim are cited the cases of *Tullis* v. *Lake Erie & W. R. Co.*, 175 U. S. 348, and

Missouri P. R. Co. v. *Mackey*, 127 U. S. 205. Those cases decide that a statute making a railroad company liable for the negligent act of a *fellow servant* are not in conflict with said Fourteenth Amendment, and consequently, have no application to the case at bar, in which the acts of a *fellow servant* is *not* involved in any manner.

We cheerfully concede that if Sumner I. Smith had been killed by the act of a fellow servant, that plaintiff in error herein would have been liable for the death of said Smith.

We also concede that if any other employe in said paper mill had been injured by the failure of said Sumner I. Smith to guard a machine that such injured employe could have recovered damages from plaintiff in error for such injury.

But we do *not* concede that if Sumner I. Smith, himself, was injured, because of *his own failure* to *guard* a machine, that *he* could maintain an action for such injury against plaintiff in error who was not at fault in any manner. If he could, then he would only be obliged to testify, in substance as follows: I entered into a contract with the owner of a paper mill (individual or corporation) by which I became superintendent of said mill, and *agreed to safeguard* all *machinery when practicable* and take entire charge and control of said mill in detail and operate it, "as if I were the owner of said mill" except as to buying *new* machinery; I failed to perform my said contract and was injured on a machine, which I was "adjusting," solely because *I did not* safeguard it; though the owner of said

mill was *not* at fault, and fulfilled every duty which said owner owed *to me,* still I demand $15,000 (or any sum a jury may award me) for my said injuries from said owner because the state statute provides that the *owner* should *guard* the machinery which *I* agreed, with such owner, to *guard* for him and for which he paid me a good salary because I knew, by my skill and experience, when the use of a guard was "practicable."

Under such a state of facts, which we claim is substantially the evidence in case at bar, is there any legal liability on the part of plaintiff in error?

We contend that no state, by its legislature or its courts, can create such a liability on an owner of a mill who is not at fault, as such a liability is prohibited by said Fourteenth Amendment to the Constitution of the United States.

In the brief of defendant in error (p. 20) is cited the case of *Munn* v. *The People of Illinois,* 94 U. S. 113. That case is, also, not applicable to the case at bar, as the decision simply held that the state of Illinois, by its legislature could fix the maximum charges for storage of grain in elevators which the state constitution declared were public warehouses. This court, in that case, affirmed the decision of the Supreme Court of Illinois rendered in the year 1873 (69 Ill. 83) wherein the Illinois court, in an opinion written by Mr. Justice Breese, held that the statute of Illinois was not in violation of the Federal Constitution.

That the Munn case, *supra,* has no application to a case involving the constitutionality of a statute which

makes a person, who is *not* at *fault*, liable in damages to *another person*, is plainly shown by another decision rendered by the *same judge* of the Supreme Court of Illinois (Mr. Justice Breese), who a few years after rendering the Munn decision, also wrote the opinion of the court in the case of *Ohio & Miss. Ry. Co.* v. *Lackey*, 78 Ill. 55 (cited in our original brief, p. 36), wherein Mr. Justice Breese decided that a state statute *is* invalid which attempts to create a liability upon railroads when they are not at fault, and does not cite or even refer to his decision rendered in said Munn case, which he would have done had he thought it was at all applicable.

In brief of defendant in error (p. 21) is also cited the case of *Mondou* v. *N. Y., N. H. & H. R. R. Co.*, 223 U. S. 1, which applies to the Federal Employers' Liability Act of 1908 relating to the liability of common carriers by railroads to their employes.

Under said Federal Statute, an employe who is injured solely because of *his own* negligence, *without fault of the employer*, can *not* recover damages for personal injuries sustained. Ry. Co. v. Schurman, 237 Fed. 6.

The contention made in said brief of defendant in error that the construction placed on the state statute by the Kansas Supreme Court "is binding" on this court, may be correct *insofar* as the *intention* of the state legislature is concerned; but said decision of the Kansas Court is *not* binding on *this* court on the question as to whether said Kansas statute, as *construed, applied* and *enforced* by said *state* court, is repugnant to the "due process of law" and the "equal protection of the law"

clauses of the Fourteenth Amendment to the Constitution of the United States.

If a decision of a *state court,* holding a state statute was *not* repugnant to the Federal Constitution, is binding on *this* court, the Fourteenth Amendment to said Constitution would have no efficacy and the states would have unbounded power.

There must, necessarily, be a limit to the valid exercise of the police power of the state, otherwise it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people. "The claim of the police power would be a mere pretext—become another and delusive name for *supreme* sovereignty of the state to be exercised *free* from *constitutional restraint.*"

(*Lochner* v. *New York,* 198 U. S. 45.)

Many statutes have been declared repugnant to said Fourteenth Amendment of the Constitution of the United States because they attempted to create a liability upon persons who were not at fault *even when the persons injured were also not at fault.*

The case of *Dougherty* v. *Thomas,* 174 Mich. 371, cited in original brief of plaintiff in error refers to many cases of like character where the courts held that such statutes attempted to take property without "due process of law" from one man and give it to another when *neither* party was at fault.

In a case at bar, the state statute, *as* put in *operation* and *enforced* by the Kansas *courts* not only takes prop-

erty from J. D. Bowersock, who was *not at fault,* but, *in addition thereto,* gives his property to the representative of *Sumner I. Smith,* who was the *only person who was at fault.*

Can such be the law of this country? Plaintiff in error earnestly contends that no state can by its legislature or courts, enforce such a statute or decision of its courts, as such procedure takes property without "due process of law," in total disregard of the prohibitions of the said Fourteenth Amendment. The mere fact that a state enacts a statute is not conclusive that such statute *is the law* of that state.

In referring to a statute of Virginia, this court in *Poindexter* v. *Greenhow,* 114 U. S. 288, *supra,* says:

> "That, it is true, *is* a legislative *act* of the government of Virginia, *but* it is *not* a *law* of the state of Virginia."

In case at bar, the statute as *construed, put in operation and enforced* by the Kansas courts is not *the law* because it violates said Fourteenth Amendment to the United States Constitution in several different ways hereinbefore mentioned and deprives plaintiff in error of his legal rights claimed and asserted, under said Fourteenth Amendment both in the trial court and in the highest court of the state of Kansas, for the reasons given in this brief and in the original brief of plaintiff in error, who prays that the judgment of the District Court of Douglas County, Kansas, and said Supreme Court of Kansas may be set aside and reversed and held for

naught; that he may have judgment granting to him his just and lawful rights under said Fourteenth Amendment to the Constitution of the United States, and that he may be restored to all things which he has lost by this action and because of said judgment of said trial court and the affirmance thereof by the highest court of the state of Kansas.

Respectfully submitted,

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Plaintiff in Error.

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(24,805)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916.

No. 172

J. D. BOWERSOCK, PLAINTIFF IN ERROR,

vs.

ADA BURHANS SMITH, ADMINISTRATRIX OF THE ESTATE OF SUMNER I. SMITH, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

STATEMENT

Defendant in Error deems it important to make a short statement of facts in addition to those detailed in the brief of Plaintiff in Error.

Sumner I. Smith, the husband of Defendant in Error, was killed November 28, 1911, at Lawrence, Kansas, while in the employ of Plaintiff in Error. Defendant in Error, as administratrix of the estate of Sumner I. Smith, deceased, thereafter brought an action against the Plaintiff in Error in the District Court of Douglas County, Kansas, and on the 18th

day of June, 1913, recovered a judgment against the Plaintiff in Error in the sum of $10,000.00. Plaintiff in Error appealed from this judgment rendered in the District Court of Douglas County, Kansas, to the Supreme Court of the State of Kansas, and on the 10th day of April, 1915, the Supreme Court of Kansas affirmed the judgment of the District Court of Douglas County, Kansas. The opinion which the Supreme Court of Kansas rendered in affirming this judgment being found between pages 55 and 61 of the Transcript of the Record.

The cause of action as alleged in the petition of Defendant in Error, as administratrix of the estate of her deceased husband, was based on what was known as a violation of the Factory Act of the State of Kansas, the same being Session Laws of 1903, Chapter 353, General Statutes of Kansas, Sections 4673 to 4683. That is, that this Plaintiff in Error had violated said Factory Act by failing and neglecting to safe guard and screen the machinery located in Plaintiff in Error's paper mill as provided in the laws above referred to, and that by reason of the failure of Plaintiff in Error to perform this statutory duty as provided in said laws, Sumner I. Smith, husband of Defendant in Error, came to his death. And the facts to which we particularly desire to call this Court's attention, leading up to the death of the said Sumner I. Smith, are as follows:

J. D. Bowersock was the sole owner and operator of the Lawrence Paper Manufacturing Company. Irving Hill was the manager of the business, and Paul Dinsmore was the assistant manager thereof, and Sumner I. Smith was the superintendent of said concern and inferior in authority to them

Transcript of the Record, pp. 26 and 27. During the course of the employment of Sumner I. Smith, Mr. Bowersock, the owner and proprietor personally prepared certain placards of caution, urging each employee to report at once to the office of the Lawrence Paper Manufacturing Company any machinery, dangerous place or tools which, in the mind of the employee, should either be safe guarded, repaired or improved. These placards were sent to the office, and one of them was handed by Paul Dinsmore, the assistant manager, to Sumner I. Smith to be posted in the building of the Lawrence Paper Manufacturing Company, which placard read as follows,—

"CAUTION

Every Employee is Urged To Be Careful in Order to Avoid Accidents.

If there is any machinery, dangerous place or tool that you think should be safeguarded, repaired, or improved, we will regard it a favor if you will report same at once to the office. It is desired that all employees assist in reducing accidents to the lowest possible point.
November, 1911.

BOWERSOCK MILL & POWER CO.
LAWRENCE PAPER MFG. CO.
LAWRENCE IRON WORKS.
GRIFFIN ICE CO."

Transcript of Record, p. 31.

That shortly after this placard had been posted in the Lawrence Paper Manufacturing Company's building, and on the 28th day of November, 1911, Sumner I. Smith, husband of defendant in error was killed by getting caught between the dryer felt roll, which is a roll about six inches in diameter, and the dryer roll which is a roll about three feet in diameter. These rolls run together like a clothes wringer. Mr. Dins-

more, assistant manager, was with Sumner I Smith when the accident occurred, and both were apparently inspecting these rolls. A part of the body of Sumner I Smith was drawn between these rolls and he was killed instantly, and thereafter but on the same day that the accident occurred, November 28, 1911, this machinery was guarded by the plaintiff in error.

Mr. Garfield Fearing, one of the employees of the Plaintiff in Error, testified as follows,

"Q. You may state to the jury if there were any guards or screens along the dryer felt roll and the dry roll on the 28th of November, 1911, or at the time Mr. Smith was killed?
A. No, sir, there was not.
Q. There was none?
A. No.
Q. Was that afterwards guarded?
A. Yes, sir.
Q. When?
A. That night, after supper.
Q. After supper?
A. Yes, sir.
Q. Can you describe to the jury the office of that guard, what was it there for?
A. Why, it was to keep anybody else from falling in.
Q. Or getting their hands in between the rolls?
A. Yes.
Q. Describe it to the jury; can you?
A. Why, it was a plank about a two by eight fastened to the drier—on the frame of the squeeze rolls, one end fastened on this side and one on the other, right above the dryer felt roll."

Transcript of Record, p. 19.

Among other defenses pleaded by Plaintiff in Error, it was alleged in his answer as follows,

"3. Said defendant further answering says that it was not practical to provide the rolls and machinery with guards or screens, as alleged in said amended petition, and that the absence of such guards or screens or failure to provide them, as alleged in said amended petition, was not the proximate cause

of nor did the same directly contribute to the alleged injury and death of the said Sumner I. Smith."

Transcript of Record, p. 8.

Plaintiff in Error introduced at the trial of the case a large amount of expert testimony to show; (a) that it was not practicable to guard or screen the particular machinery which caused the death of Sumner I. Smith; (b) that it was dangerous to the machine tender and it hindered him in the performance of his work to have this particular machinery guarded or screened; (c) that other paper mills did not guard or screen this particular machinery.

William O'Brien, a witness for Plaintiff in Error, who was superintendent of the Lawrence Paper Manufacturing Company at the time of the trial of this action, and with twenty-seven years experience in manufacturing paper, testified as follows:

"Q. Now, have you ever seen a machine, a paper machine, in all your experience, that had a plank ten inches in width above the felt roll, at the place indicated where this accident occurred?

A. No, I never did.

Q. Is it practicable or feasible to place a plank at the point indicated by X on this map?

A. I never saw any place where you could put a plank of that kind without it being in the way.

Referring to a board (called a guard) placed on the machine after the death of said Sumner I. Smith, attorney for plaintiff, S. D. Bishop, inquired of the witness as follows:

Q. If it destroyed the efficiency of the machine, and wasn't practicable to operate it, you as a superintendent of thirty-five years' experience would have removed it, wouldn't you?

A. I would take it away anyway if I was running the machine; it is in the way.

Q. You mean to say, do you, that if a workman under you would take that guard away you would permit it?

A. Why, sure.

Q. You would; and you would allow the workman to go in there between the press and the machine without any protection whatever?

A. Well, I never heard of anybody getting hurt until this affair, and I pass through there a dozen times a day."

Transcript of Record, pp. 33 and 34.

Mr. Irving Hill, the manager of the Lawrence Paper Manufacturing Company, who had observed the particular machinery which killed the said Sumner I. Smith, and knew that the same was unguarded, testified as follows:

"Q. Why did you allow that establishment to be operated without the machinery being guarded—you were the manager?

A. The places that were known to me were guarded.

Q. The places that were known to you were guarded?

A. Yes.

Q. You had the power as manager of that establishment to have the machinery guarded before the mill went into operation, didn't you?

A. The authority, perhaps, yes; but the procedure in the business is that the superintendent hired to operate the mill shall have charge of it.

Q. I don't care anything about that. You had knowledge that the machinery was unguarded and yet you permitted the mill to run, didn't you?

A. I just stated to you that the places within my knowledge were guarded, the places within my knowledge that were dangerous were guarded before it started.

Q. You knew all about the squeeze rolls and the dry felt rolls and the dryer rolls, didn't you?

A. It was my experience that those places were not considered dangerous; a number of mills that I have been in that place was not guarded.

Q. I am not asking you anything about the danger of it. These dryer rolls and felt rolls were not guarded, were they?

A. They were not guarded."

Transcript of Record, p. 28.

J. F. Ellsworth, another expert paper manufacturer, testified as follows: That he lived in Independence, Kansas; had been in the business of manufacturing paper for about forty

years; that he had erected paper mills, operated the machinery, and had acted as superintendent of paper mills in Iowa, and in Illinois, and operated a mill in Independence, Kansas.

Referring to the place on the machine where Sumner I. Smith was injured, witness was asked

"Q. State what would be the effect of putting a plank eight inches wide across the machine at that point?
A. Well, it would bother most machine tenders.
Q. Have you ever seen in your experience a machine with a plank across there at that point, or guarded at that point?
A. No, sir; never until I saw it on this machine down there.
Q. State whether or not a guard at that point is practicable or efficient?
A. Well, it is my opinion that it would bother the machine tender.
Q. State whether or not it would increase the danger to the operator at that point in having to run it?
A. If I were running the machines I would rather have it off; I would rather not have it on there. I don't know whether I could do it better, but if I was a machine tender I would rather not have it."

Robert Clark, an expert paper manufacturer, testified that it was not practicable to guard this particular machinery. That it would destroy its efficiency and delay and hinder the tender.

Transcript of Record, pp. 36 and 37.

Edward Malone, an expert machine tender, testifies that he had been engaged in the business of manufacturing paper in various parts of the United States for twenty-five years and

"That such a plank or guard was not efficient or practicable and that such a plank or guard would be more injurious than not to have it there as it would prevent him seeing his hands."

Transcript of Record, pp. 37 and 38.

The Factory Act of the State of Kansas, in so far as it is material to a discussion of the law in this case, is as follows:

"AN ACT requiring safeguards for the protection of all persons employed or laboring in manufacturing establishments, and providing civil remedies for all persons so engaged, or their personal representatives, in cases where any such person may be killed or injured while employed or laboring in any manufacturing establishment which is not properly provided with the safeguards required by this act.

* * * * * * * * * * * * *

SEC. 4. Every person owning or operating any manufacturing establishment in which machinery is used shall furnish and supply for use therein belt-shifters, or other safe mechanical contrivance for the purpose of throwing on or off belts or pulleys; and wherever it is practicable machinery shall be operated with loose pulleys. All vats, pans, saws, planers, cog gearing, belting, shafting, set-crews and machinery of every description used in a manufacturing establishment shall, where practicable, be properly and safely guarded, for the purpose of preventing or avoiding the death of or injury to the persons employed or laboring in any such establishment; and it is hereby made the duty of all persons owning or operating manufacturing establishments to provide and keep the same furnished with safeguards as herein specified.

SEC. 5. If any person employed or laboring in any manufacturing establishment shall be killed or injured in any case wherein the absence of any of the safeguards or precautions required by the act shall directly contribute to such death or injury, the personal representatives of the person so killed, or the person himself, in case of injury only, may maintain an action against the person owning or operating such manufacturing establishment for the recovery of all proper damages. In cases where the action is brought by the personal representative of the deceased, said action shall be governed in all respects not herein provided for by the provisions of the statutes now in force which authorize and regulate the bringing of actions to recover damages in cases where the death of one is caused by the wrongful act or omission of another; provided, action shall be commenced in the county where the accident occurred.

SEC. 6. In all actions brought under and by virtue of the provisions of this act, it shall be sufficient for the plaintiff to prove in the first instance, in order to establish the liability of the defendant, that the death or injury complained of resulted in consequence of the failure of the person owning or

operating the manufacturing establishment where such death or injury occurred to provide said establishment with safeguards as required by this act, or that the failure to provide such safeguards directly contributed to such death or injury.

SEC. 7. Manufacturing establishments, as those words are used in this act, shall mean and include all smelters, oil refineries, cement works, mills of every kind, machine and repair shops, and, in addition to the foregoing, any other kind or character of manufacturing establishment, of any nature or description whatsoever, wherein any natural products or other articles or materials of any kind, in raw or unfinished or incomplete state or condition, are converted into a new or improved or different form.

SEC. 8. Wherever the expression occurs in this act in substantially the following words: "Every person owning or operating any manufacturing establishment," or where language similar to that is used, the word "person" in that connection shall be held and construed to mean any person or persons, partnership, corporation, receiver, trust, trustee, or any other person or combination of persons ,either natural or artificial, by whatever name he or they may be called.

SEC. 9. This act shall take effect and be in force from and after its publication in the statute-book.

Approved March 11, 1903."

The facts detailed and the statutes quoted herein, present to this Court the following questions:

1. Was the duty, under the facts and law, to safeguard the machinery or screen the same located in the paper mill of Plaintiff in Error, cast upon Sumner I. Smith, or was it the duty of Plaintiff in Error, the owner and operator of said mill to safeguard or screen said machinery in the manner provided by law.

2. Does the state of Kansas, in the exercise of its police power for the safety and protection of those employed in a manufacturing establishment, have a right to enact a law which abolishes all common law defenses in an action when an employee is injured or killed regardless of the nature of the employment or the rank or grade of the employee?

3. As construed by the Supreme Court of Kansas, the Factory Act of said state abolishes all common law defenses. Is such a construction, as applied to the facts in this case, in violation of the Fourteenth Amendment of the Constitution of the United States in this, to-wit: Does it take Plaintiff's property without due process of law? Does it deny him the equal protection of the law? Does it deprive him the liberty of contract?

ARGUMENT

THE DUTY TO SAFEGUARD OR SCREEN THE MACHINERY LOCATED IN THE PAPER MILL BELONGING TO PLAINTIFF IN ERROR WAS NOT, *AS A MATTER OF FACT*, DELEGATED OR GIVEN TO THE SUPERINTENDENT OF SAID MILL, BUT WAS EXPRESSLY RESERVED IN THE OWNER, MANAGER AND ASSISTANT MANAGER OF THE SAME. IN FACT IT IS SUCH A DUTY THAT COULD NOT BE DELEGATED.

The placard, personally written by Plaintiff in Error and by him sent to the office of the paper mill with directions to have the same posted, and then by the assistant manager handed to Sumner I. Smith for posting, shows conclusively, as a matter of fact, that he had reserved the authority in himself and his managers to make all improvements and place the necessary guards and screens for the machinery located in the mill, and that he had not delegated this authority or power to his superintendent. A casual analysis of the contents of this placard shows this to be true. This placard is addressed to all of the employees of Plaintiff in Error and not to his superintendent. It says, in substance,—"If any employee should deem any machinery dangerous or that it needed to be safe-guarded, repaired or improved, to report

this information to the office in order that accidents could be reduced to the lowest possible point."

It stands to reason, that if Plaintiff in Error had clothed his superintendent with the authority to safeguard the machinery located in the paper mill and made it the superintendent's positive duty to see that said machinery was properly screened whenever practicable, that the Plaintiff in Error would have addressed this placard to his employees and directed them to report to the superintendent and not to the office. No other rational conclusion can be arrived at. No where in this placard is there any direction on the part of Plaintiff in Error to any of his employees that they should make a report to the superintendent of the dangerous condition of the machinery or that the same needed to be improved or safeguarded. Neither is there any intimation in the placard that Plaintiff in Error would hold the superintendent responsible in any manner for any machinery which was not properly safeguarded. On the contrary, Plaintiff in Error specifically enjoins all of his employees in that paper mill to make such reports to his office where Plaintiff in Error, his manager and assistant manager could be found.

The reason why Sumner I. Smith was not given this power and authority is obvious. He did not have control of the paper mill. Neither did he have the power to make expenditures therein. The control of this paper mill and the power to appropriate any money which might be necessary to make needed improvements or to repair machinery or to safeguard or screen or improve the same was vested solely in Plaintiff in Error and his managers.

Then, again, there is another reason why this particular

machinery was not screened or guarded in the manner provided by law. The Plaintiff in Error and his managers, according to the testimony found in this record and quoted in the statement of facts, did not believe it to be practicable to safeguard the machinery which caused the death of Sumner I. Smith. They knew that this machinery was not safeguarded. This knowledge was shown clearly in the testimony of Irving Hill, manager. He was asked this specific question, "You knew all about this squeeze rools and the dryer felt rolls and the dryer rolls, didn't you?" And he answered, *"It was my experience that those places were not considered dangerous. A number of mills that I have been in, that place was not guarded."* (Transcript of Record, p.28).

Then, again, Plaintiff in Error and his managers must have believed at that time, according to their own testimony and the testimony of their experts that it was not only impracticable to guard this machinery, but also believed that the safeguarding of the same would make it more dangerous for the machine tender to operate the machinery. (See the testimony of Plaintiff in Error's expert witnesses quoted in the statement of Defendant in Error). Now, we ask the question,—What success would Sumner I. Smith, under these conditions, have met had he made a request to Plaintiff in Error to safeguard the machinery which caused his death? The Supreme Court of Kansas has answered this question in apt language, and we take the liberty of quoting the same as a part of our argument. The Supreme Court of Kansas, in rendering the opinion in this case says,

"The expression, "all persons employed or laboring in any manufacturing establishment," is general and comprehensive,

and nothing in the provisions of the act prescribes limitations or indicates a purpose to except from its operation any one employed there because of the nature of his employment, his grade or his rank. Smith did supervise the work done in the paper mill, but he was subordinate to the owner and his managers. The condition of the machinery and the peril of operating near it was open to the observation of the defendant and those who were managing his business. Smith doubtless observed and understood the danger, too, and if assumption of risk and contributory negligence were defenses in an action under the act the plaintiff would have found much difficulty in establishing a right of recovery. While Smith superintended the details of the making of paper and the running of the plant, the defendant and his managers controlled the establishment and the expenditure made in it. An application for an appropriation to safeguard the machinery might or might not have been approved. The fact that the defendant called experts in paper making as witnesses to show that it was neither practicable nor necessary to safeguard the machinery, and that the manager, Hill, testified that places in the mill which he deemed to be dangerous had been safeguarded, and also that in his experience such rolls and machinery were not regarded as dangerous, and his statement that in a number of mills which he had visited rolls like these were not safeguarded, indicates, to some extent, how a suggestion of Smith that they be safeguarded would have been received. In the effort to shift the responsibility for the failure to safeguard the machinery, attention is called to the notice prepared by defendant asking employees to report to the office any machinery, place or tool that they might think should be safeguarded or repaired. This was addressed to each employee in the four establishments operated by defendant, and while the notice appears to have been brought directly to the attention of Smith, it will be observed that the employees were not requested to report to the superintendent, but were required to report to the office, which was in charge of the defendant and his managers. Under the notice, Smith, as well as others employed in the mill, were only requested to make a report of conditions to the office, in order to "assist in reducing accidents to the lowest possible point." An owner or operator cannot discharge the duties imposed on him by statute nor rid himself of liability under the act by posting admonitions to employees or the issuance of instructions to them or the making of rules for their guidance. (Caspar v. Lewin, 82 Kan. 604,

109 Pac. 657.) Cases may possibly arise where a person employed in a manufacturing establishment may not be entitled to claim the protection of the act as against an owner or operator, but certainly nothing appears in the circumstances of the present case or the relations of the parties which took Smith out of the protection of the act or absolved the defendant from liability for failing to provide safeguards for machinery which it is conceded were practicable and necessary to the safety of employees."

Smith vs. Bowersock, 95 Kans. pp. 104-105 and 106.

Paul Dinsmore, assistant manager of the Lawrence Paper Mill, testified relative to the power of the superintendent, as follows,

"Q. Would you have the power to say to him, this machinery must be guarded?
A. Certainly; but so far as locating where the guards belong, that is the mechanics end of it.
Q. If you ordered that and he failed and neglected to do it, you would have the power to discharge him?
A. I would." (Transcript of Record, p. 33.)

This evidence shows that if Mr. Dinsmore became convinced that a particular machine needed to be guarded, and had ordered Mr. Smith to safeguard it, and he had refused, that Mr. Dinsmore had the authority to discharge him. To be sure, Mr. Dinsmore says later, in his testimony, that Mr. Smith's opinion would have been preferred to his, but so might be the opinion of any other employee of the mill. We think that the evidence in this case shows conclusively, that there was no contract in the employment of Mr. Smith to the effect that he was to safeguard the machinery. On the contrary, we assert that Plaintiff in Error reserves this power unto himself and his managers, and that it was the duty of the Plaintiff in Error, under the facts and under the law to safeguard the machinery which caused the death of Sumner I. Smith. It was a statutory duty on the part of Mr. Bower-

sock. This Court will note, in the last three lines of Section 4 of the Factory Act of the State of Kansas, the following language is used, "And it is hereby made the duty of all persons owning or operating manufacturing establishments to provide and keep the same furnished with safeguards as herein specified." Thus, it will be seen, that by the very terms of the Factory Act, the owner and operator could not successfully evade this statute by attempting to delegate his mandatory duty to another. See, Caspar vs. Lewin, 82 Kansas, 604. At page 627 of this case, the Supreme Court of Kansas, in discussing the Factory Act now under consideration says:

"The master may not, however, successfully evade the statute by attempting to narrow the scope of his servant's duty by rules or instructions. Thus, in this case, workmen were obliged to ascend the ladder to put the belt on the shaft pulley and to oil the shafting. The statute could not be nullified by an order to do this work only while the machinery was not in motion."

DOES THE STATE OF KANSAS, IN THE EXERCISE OF ITS POLICE POWER FOR THE SAFETY AND PROTECTION OF THOSE EMPLOYED IN A MANUFACTURING ESTABLISHMENT, HAVE A RIGHT TO ENACT A LAW WHICH ABOLISHES ALL COMMON LAW DEFENSES TO AN ACTION WHEN AN EMPLOYEE IS INJURED OR KILLED, REGARDLESS OF THE NATURE OF THE EMPLOYMENT OR THE RANK OR GRADE OF THE EMPLOYEE?

The Factory Act enacted by the legislature of the State of Kansas now under consideration, is both humanitarian and remedial. It was enacted by the legislature of said State for the purpose of promoting the health, the safety and the wel-

fare of all persons employed or laboring in manufacturing establishments. This law is strictly within the police powers of the state. As we take it, a state has a right to enact laws such as will promote the health, the safety and the welfare of its citizens. It is useless for the writers of this brief to enumerate the multitude of accidents which occur in manufacturing establishments, which use dangerous and unguarded machinery. Suffice it to say, that accidents of this character, due from the careless neglect of the owners and operators of factories and manufacturing establishments, on account of the dangerous equipment employed by them, have become so common and prevalent that nearly all of the states have enacted laws similar to the one now under discussion for the express purpose of diminishing the frightful loss of life and limb of those who are employed and laboring in these various institutions.

These laws have been repeatedly held to be within the police powers of the state, and not in conflict with any constitutional provisions of the United States. Thus, it has been held by this Honorable Court that

"The protection of the health and morals, as well as of the lives of the citizens is within the police power of the state legislature."

See, Holden vs. Hardy, 169 U. S. 366.

Chicago, B. & Q. R. R. Co. vs. McGuire, 219 U. S. 549.

Erie R. R. Co. vs. Williams, 233 U. S. 685.

Coppage vs. State of Kansas, 236 U. S. 1.

In this last case, this Honorable Court said

"We need not refer to the numerous and familiar cases in which this court has held that the power may properly be exercised for preserving the public health, safety, morals or

general welfare and that such police regulations may reasonably limit the enjoyment of personal liberty including the right of making contracts."

Plaintiff in Error has called this Court's attention specially to the Coppage case as sustaining his theory. The Coppage case related to the right of the State of Kansas to pass a law forbidding any individual or member of any firm or any agent of any company or corporation to coerce, require, demand or influence any person to enter into any agreement, either written or verbal, not to join, become or remain a member of any labor organization, also providing a punishment for violating said act. This Court held that such a law was a violation of the Fourteenth Amendment of the Constitution in as much as the rights of personal liberty and property were infringed without due process of law. In rendering said decision, this Court very carefully distinguishes between that class of laws and *those laws which involve the preserving of the public health, safety, morals or general welfare of the citizens of a state.*

We also wish to call the attention of the Court to the case of Adair vs. U. S. 208 U. S. 161 cited by Plaintiff in Error in support of his contention.

The Court will readily see that the law under consideration in that case was very similar to that passed on in the Coppage case, supra, being a prosecution by the government for the violation of an Act of Congress making it unlawful for any employer to require an employee to enter into an agreement not to become or remain a member of any labor organization. The Court held that the law was unconstitutional for the reason that it interfered with the right of con-

tract. But it will be noted in that case, as in the Coppage case, the law did not involve *any question affecting the public health, safety or welfare* and is, therefore, not applicable to the law under discussion or the facts in this case.

AS CONSTRUED BY THE SUPREME COURT OF KANSAS, THE FACTORY ACT OF SAID STATE ABOLISHES ALL COMMON LAW DEFENSES. IS SUCH A CONSTRUCTION, AS APPLIED TO THE FACTS IN THIS CASE, IN VIOLATION OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES IN THIS, TO-WIT: DOES IT TAKE PLAINTIFF'S PROPERTY WITHOUT DUE PROCESS OF LAW? DOES IT DENY HIM THE EQUAL PROTECTION OF THE LAW? DOES IT DEPRIVE HIM THE LIBERTY OF CONTRACT?

The Factory Act of Kansas, Session Laws of 1903, Chapter 356, as construed by the Supreme Court of said State, abolishes the common law defense. As to assumption of risk, see

Lewis vs. Barton Salt Co. 82 Kans. 163.

In this case, the Supreme Court held that the Factory Act excluded the defense of assumption of risk, but did not exclude the defense of contributory negligence.

Shortly thereafter, the Supreme Court of Kansas held that contributory negligence was not a defense to the Factory Act and overruled the second paragraph of the syllabus in Lewis vs. Barton Salt Co., supra. See

Caspar vs. Lewin, 82 Kans. 604.

The Court held in this case that contributory negligence was no defense in an action brought under the Factory Act.

We desire to call the Court's attention to the opinion of

the Supreme Court in Caspar vs. Lewin. It is an exhaustive opinion and takes up in detail every section of the Factory Act. It reviews the history of the legislation concerning this matter in the various states. And the Supreme Court of Kansas has followed the doctrine laid down in Caspar vs. Lewin upon numerous occasions, and the construction placed by the Supreme Court on the Factory Act in Caspar vs. Lewin has now become the settled law in the State of Kansas.

As to the common law rule of superior servant, see

Rank vs. Packing Co. 92 Kansas, 917.

See, also, the case at bar, Smith vs. Bowersock, 95 Kansas. 96. In this case, the Supreme Court of Kansas holds, in effect, that all persons employed or laboring in a manufacturing establishment are entitled to the protection provided for in the Factory Act without regard to the nature of their employment, their rank or grade, and it is the duty of the owner or operator to furnish safeguards for dangerous machinery where it is practicable to do so, and if he fails in his duty in this respect, he will become liable for the injury and death of any employee, including a superintendent of the factory, which results from the omission of this duty. Thus, it will be seen by this Honorable Court that the Factory Act of Kansas above referred to as construed by the Supreme Court of Kansas abrogates all common law rules relative to defense.

The first question to answer is, *Did the construction of the Supreme Court of Kansas placed upon the Factory Act of said state in the case at bar, take away the property of Plaintiff in Error without due process of law?* In answer, we say there is no property and no vested right in any rule

of the common law. That is, the law itself as a rule of conduct may be changed at the will of the law-making power. This Court has held, in numerous cases, that this is a law and does not conflict with the Fourteenth Amendment in so far as taking away the property of another without due process.

We now call the attention of this Court to these various cases. In Munn vs. The People of Illinois, 94 U. S. 113,134. This Court says:

"But a mere common law regulation of trade or business may be changed by statute. A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law cannot be taken away without due process; but the law itself, as a rule of conduct, may be changed at the will, or even at the whim, of the Legislature, unless prevented by constitutional limitations. Indeed, the great office of statutes is to remedy defects in the common law as they are developed, and to adapt it to the changes of time and circumstances. To limit the rate of charge for services rendered in a public employment, or for the use of property in which the public has an interest, is only changing a regulation which existed before. It establishes no new principle in the law, but only gives a new effect to an old one.

We know that this is a power which may be abused; but that is no argument against its existence. For protection against abuses by Legislatures the people must resort to the polls, not to the courts.

After what has already been said, it is unnecessary to refer at length to the effect of the other provision of the Fourteenth Amendment which is relied upon, viz.: That no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' Certainly, it cannot be claimed that this prevents the State from regulating the fares of hackmen or the charges of draymen in Chicago, unless it does the same thing in every other place within its jurisdiction. But, as has been seen, the power to regulate the business of warehouses depends upon the same principle as the power to regulate hackmen and draymen, and what cannot be done in the one case in this particular cannot be done in the other."

The next case cited by this Court announcing the same rule is Martin vs. Pittsburg & L. E. R. Co. 203 U. S. 284. The question involved in this case was the construction of a Pennsylvania statute relative to the liability of a railroad company for personal injuries under certain circumstances. And in this case this Court holds there is no vested right or property in any rule of the common law. See, also

Western Union Telegraph Co. vs. Commercial Milling Co. 218 U. S. 406.

This same rule was announced in Mondou vs. New York, N. H. & H. R. R. Co. 223 U. S. p. 1, the case being known as a second employers' liability case.

This Court, in discussing the object and purpose of the Act relating to the liability of common carriers by railroads to their employees, in certain cases, says,

"The natural tendency of the changes described is to impel the carriers to avoid or prevent the negligent acts and omissions which are made the basis of the rights of recovery which the statute creates and defines; and as whatever makes for that end tends to promote the safety of the employees and to advance the commerce in which they are engaged, we entertain no doubt that in making those changes Congress acted within the limits of the discretion confided to it by the Constitution."

Mondou vs. New York, N. H. & H. R. R. Co., supra.

The same argument and reasons can be advanced as to the object and purpose of the Factory Act of the State of Kansas now under discussion. This act was intended by the State of Kansas to promote the safety and welfare of all people employed or laboring in manufacturing establishments. And the natural tendency of the Factory Act was to impel manufacturers to use the greatest of care to protect the lives and limbs of their employees.

The second question to answer is, Did the Factory Act, as construed by the Supreme Court of the State of Kansas, *deny Plaintiff in Error the equal protection of the law?* It seems to the writers of this brief, that the argument of Plaintiff in Error is strained and far-fetched. The Factory Act of the State of Kansas provides

"If any person employed or laboring in any manufacturing establishment shall be killed or injured in case wherein the absence of any of the safeguards or precautions required by the act shall directly contribute to such death or injury"

an action may be maintained by the personal representative of the deceased or injured person as the case might be. The language is broad. It includes every person employed or laboring in a manufacturing establishment. It places no limitation on the age, or the grade of employment, or the employee or laborer. All that is necessary to bring them within the purview of the Act is that *they must be employed or laboring in a manufacturing establishment.* They may be apprentices, mechanics, foremen or superintendents, and if they are injured by machinery that is not guarded, the employer, whether an individual or a corporation, is liable under the law.

If it had been the intention of the legislature to limit the scope of the Act to any particular grade of laborer or workman, it would have been very easy to have done so. They might have limited it to laborers, mechanics and workmen. Then the employer's liability would have been confined to the class designated. But it did not limit the liability to any designated class, but included every person *employed* or *laboring* in a manufacturing establishment. And the Supreme Court of Kansas, in deciding this case, says that a superin

tendent comes within the scope of the Act.

The Plaintiff in Error argues that the Kansas statute as construed, applied and enforced by the Supreme Court of Kansas, denies him the equal protection of the law, for the reason that a corporation owner of a manufacturing establishment cannot come within the rule as laid down by the Kansas Court as it is impossible to compel a corporation itself to guard machinery. We will admit that a corporation being only a creature of the law, could not itself guard machinery, but the governing body of the corporation, either the stockholders at their regular meetings, or the Board of Directors, as the case might be, could require that all machinery must be guarded, *and they could further see that no machinery was put in operation or use until it was guarded.* If they neglected to perform this duty, which is required of them by law, then any laborer or other person employed in their manufacturing establishment could certainly recover. If the Lawrence Paper Manufacturing Company were a corporation, we insist that under the facts in this case the Defendant in Error could recover as the deceased, Sumner I. Smith, would have been subordinate to the president, the manager and assistant manager, and if the president of the corporation had personally prepared a placard and had his assistant manager hand it to the superintendent of the Paper Mill to be posted therein, which placard requested the employees to *report to the office* any machnery that needed guarding, under such facts would not the corporation be liable? If the employer can contract with an employee that the employee shall prepare and install suit-

able guards for the machinery, then the Factory Act will be practically nullified. He could make every person employed or laboring in his establishment a vice principal. If J. D. Bowersock could make a contract with Sumner I. Smith, the superintendent, that Smith should see that all machinery was properly safeguarded, then he could have made a contract with Albert Neubauer, the man who operated the rolls in which Sumner I. Smith was killed, that Neubauer should see that the necessary safeguards were placed on the rolls, make him a vice principal and thereby relieve himself from all liability to the workman who was in the most danger from the operation of said machine. In the Lawrence Paper Manufacturing establishment, Smith had three superiors: Mr. Bowersock, the manager, and the assistant manager; and Albert Neubauer had four, the fourth being Sumner I. Smith.

This Court has held frequently that legislation similar to the Factory Act of the State of Kansas is not in conflict with the Fourteenth Amendment to the Constitution of the United States as *a denial of the equal protection of the law.* Thus in Tullis vs. Lake Erie & Western Railroad Company, 175 U. S. 348, it is said that

"A statute making a railroad company liable to an employee injured by the negligent act of a fellow servant is not unconstitutional as a denial to such corporation of the equal protection of the laws since there are peculiar hazards in the operation of a railroad."

Now hazards in operating a railroad, in many respects, are not more dangerous than the operation of a manufacturing establishment equipped with ponderous and dangerous machinery of all kinds and character. And the same principle of law involved in Tullis vs. Lake Erie & Western Rail-

road Company, supra, is presented in the Factory Act of the State of Kansas.

In the case of Missouri Pacific Railway Co. vs. Patrick Mackey, 127 U. S. 205, this Court says,

"The law of Kansas making a railroad company liable to an employee for the negligence or mismanagement of other employees or agents of the same company is not in conflict with the Fourteenth Amendment to the constitution of the United States in that it deprives the company of its property without due process of law and denies it the equal protection of the laws."

In deciding this case, this Court further said

"But the hazardous character of the business of operating a railway would seem to call for special legislation with respect to railroad corporations having for its object the protection of their employees as well as the safety of the public."

In Caspar vs. Lewin, 82 Kans. 604, at page 629, the Supreme Court of Kansas, says in regard to the object of the Factory Act,

"But what is the spirit of this statute? It is to stop the insufferable waste of human life and limb which has been the universal accompaniment of the conduct of manufacturing industries. The law is a police regulation, adopted to reform the inhumanity of factory methods and to prevent the casting into the world of dependent cripples and widows and orphans left without means of support. This purpose includes the reduction of the number of casualties to the careless as well as to the prudent. If the prescribed precautions be taken and the required safeguards be installed, killing and maiming will cease, or at least will be reduced to a minimum."

The same object which prompted the legislatures of the state of Missouri, of the state of Iowa and of the state of Indiana and other states, to pass laws abrogating the fellow servant rule in the operation of railroads and which prompted the United States Congress to enact the Employers Liability Act in 1908, also was the prime motive which caused the

legislature of the state of Kansas in 1903 to pass what is known as the Factory Act. These laws were passed for the purpose of promoting the welfare and safety of the citizens. Such laws are police regulations and have been held almost uniformly by all of the courts that they are not obnoxious to either the state or federal constitutions.

See, also Bridge Terminal Co. vs. Callaghan, 194 U. S. 628.

Louisville & Nashville Co. vs. Melton, 218 U. S. 36.

The next question to answer is,—*Does the Factory Act of Kansas, as construed and applied by the Supreme Court of said State, deprive Plaintiff in Error of the liberty of contract?*

In answer, we say, that the right of contract may be limited by the state police power when the protection of the health, the safety and the morals of the citizens is involved. The precise question argued so strenuously by Plaintiff in Error in this case that his liberty of contract has been denied by the Factory Act of the state of Kansas, is neither new nor novel to this Honorable Court or to the various courts of this union. We think that it has now become the settled rule of this Court that legislation, both federal and state of this character, is not obnoxious to the Fourteenth Amendment to the Constitution of the United States in so far as it denies the liberty of contract.

In Holden vs. Hardy, 169 U. S. 366, this Court announces the following rule

"1. The right of contract is subject to certain limitations which the state may lawfully impose in the exercise of its police power.

2. The protection of the health and morals, as well as of the lives of citizens is within the police power of the state leg-

islature.

3. A state statute limiting the period of employment of workmen in underground mines, or in the smelting, reduction, or refining of ores or metals, to eight hours per day, and making its violation a misdemeanor, is a valid exercise of the police power of the state.

4. The fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere, where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself."

If the state of Utah had the power to limit the hours per day which a workman should work in an underground mine, and making it a misdemeanor for the owner of the mine to contract with the miner to work more hours per day, then we say that the state of Kansas has the power to enact a law which makes it the absolute duty of the owner or operator of a manufacturing establishment to provide and keep all machinery furnished with safeguards for the purpose of preventing or avoiding the death or injury of an employee or laborer, nothwithstanding any contract which the owner or operator may seek to make with any employee to the contrary. Thus this Court says, in Holden vs. Hardy, supra

"This power legitimately exercised can neither be limited by contract nor bartered away by legislation."

The same principle of law is announced in Miller vs. Wilson, 236 U. S. 373.

The question in this case arose upon the charge of violating a statute of the state of California relating to the hours of women employees. This Court in deciding this case, says,

"Forbidding the employment of women in certain specified establishments for more than eight hours in one day, or forty-eight hours in one week, as is done by Cal. Stat. 1911, p. 437, does not as applied to women employed in hotels, violate U.

S. Const., 14th Amend., as infringing freedom to contract."

Again, in this case, the United States Supreme Court says,

"As the liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint,—not immunity from reasonable regulation to safeguard the public interest,—the question is whether the restrictions of the statute have reasonable relation to a proper purpose. Chicago, B. & Q. R. Co. vs. McGuire, 219 U. S. 549, 567, 55 L. Ed. 328, 338, 31 Sup. Ct. Rep. 259; Erie R. Co. v. Williams, 233 U. S. 685, 699, 58 L. Ed. 1155, 1160, 51 L. R. A. (N. S.) 1097, 34 Sup. Ct. Rep. 761; Coppage vs. Kansas, 236 U. S. 1, 18, ante, 441, 35 Sup. Ct. Rep. 240. Upon this point, the recent decisions of this court upholding other statutes limiting the hours of labor of women must be regarded as decisive."

See, also

Muller vs. Oregon, 208 U. S. 412.

Keokee Consolidated Coke Co. vs. Taylor, et al 234 U. S. 224.

In this last case, this Court says

"Freedom to contract is not infringed contrary to U. S. Const., 14th Amend., by Va. act of February 13, 1888, amending and re-enacting Laws 1887, Chap. 391, §2, forbidding any person, firm, or corporation engaged in mining coal or ore, or manufacturing iron or steel, or any other kind of manufacturing, to issue, for the payment of labor, any order unless the same purports to be redeemable for its face value in lawful money of the United States."

Plaintiff in Error, in his brief, has cited and thought up a great many instances where the Factory Act of Kansas might not apply. Upon this question, this Court, in the above case says,

"It is more pressed that the act discriminates unconstitutionally against certain classes. But while there are differences of opinion as to the degree and kind of discrimination permitted by the 14th Amendment, it is established by repeated decisions that a statute aimed at what is deemed an evil, and hitting it presumably where experience shows it to be most felt, is not to be upset by thinking up and enumerating other instances to which it might have been applied equally well, so far as the court can see. That is for the legislature

to judge unless the case is very clear."

It is strenuously argued that Sumner I. Smith was at fault and that the Plaintiff in Error was not at fault. That Plaintiff in Error made a contract with Sumner I. Smith to see that this machinery was properly safeguarded. This contract, if made at all, was in violation of a statutory duty of Plaintiff in Error and therefore illegal. This, in itself, does not debar Ada Burhans Smth as administratrix from recovering a judgment against the Plaintiff in Error. As sustaining our contention, we call the attention of this Court to the case of Sturges & Burn Manufacturing Company vs. Beauchamp, 231 U. S. 320. This case involved the right of a minor to recover damages for personal injuries sustained by him when illegally employed. In deciding this case, this Court says,

"Prohibiting the employment of children under the age of sixteen years in various hazardous employments, as is done by Ill. Laws 1903, p. 187, does not take liberty or property without due process of law, contrary to U. S. Const., 14th Amend., although the statute is so construed by the highest court of the state that a violation of its provisions gives a right of action on behalf of an illegally employed minor if injured in the course of such employment, even if the employer acted in good faith, relying upon the representation of the minor that he was over sixteen."

In the opinion of this case, this Court further says,

"It is urged that the plaintiff in error was not permitted to defend upon the ground that it acted in good faith relying upon the representation made by Beauchamp that he was over sixteen. It is said that, being over fourteen, he at least had attained the age at which he should have been treated as responsible for his statements. But, as it was competent for the state, in securing the safety of the young, to prohibit such employment altogether, it could select means appropriate to make its prohibition effective, and could compel employers, at their peril, to ascertain whether those they employed were in fact under the age specified. The imposition of absolute

requirements of this sort is a familiar exercise of the protective power of government."

One of the strenuous objections to the Factory Act of the state of Kansas as construed by the Supreme Court of Kansas is that Plaintiff in Error was not permitted by the trial court to show his contract with Sumner I. Smith. The principle laid down by this Court quoted above, is a complete answer to this objection. Plaintiff in Error permitted the machinery in his factory to remain unguarded, at his peril.

THE CONSTRUCTION PLACED BY THE SUPREME COURT OF KANSAS AS TO THE PURPOSES AND OBJECTS OF THE FACTORY ACT IS CONCLUSIVE AND SHOULD BE FOLLOWED BY THIS COURT.

The Supreme Court of Kansas has decided that the Factory Act was not obnoxious to either the state or federal constitutions.

In Caspar vs. Lewin, 82 Kansas, 604, the Court says,

"The Factory Act falls within the legitimate scope of the police power of the state and the remedy prescribed for its enforcement is not obnoxious to either the state or the federal constitutions."

It also decides that the object and purpose of this Act was to protect the lives and limbs of all persons employed or laboring in any manufacturing establishment, and that a superintendent of a factory came within the purview of the Act. See,

Smith vs. Bowersock, 95 Kansas, 96.

We contend as a matter of law that this construction placed by the Supreme Court of Kansas upon the Factory Act is now binding upon this Honorable Court and should be followed.

In Tullis vs. Lake Erie & Western Ry. Co., 175 U. S. 348, this Court says,

"The interpretation of a state statute affixed to it by the state court of last resort will not be disregarded by the United States Supreme Court, and a different construction given to the statute, which will make it repugnant to the Federal Constitution."

See, also

Northern Pacific Ry. Co. vs. Mary A. Meesee, 239 U. S. 614.

The same principle is announced in the case of the City of Detroit vs. Elizabeth S. Osborn, 135 U. S. 492.

The citation of the above authorities is sufficient to call the attention of this Honorable Court to the rule that the construction which the highest court of a state places upon its own statutes is binding upon the Federal Courts.

We believe, as a matter of law, that the Factory Act enacted by the legislature of the state of Kansas, now under discussion, being a law which is both humanitarian and remedial, is not in violation of the Fourteenth Amendment of the Constitution of the United States. That the enactment of this law was within the police powers of the state of Kansas, and that the decisions of this Honorable Court cited in this brief, sustain, beyond the peradventure of a doubt, the legality of this legislation.

Defendant in Error, therefore, prays that the judgment rendered in the District Court of Douglas County, Kansas, and affirmed by the Supreme Court of the state of Kansas, be

affirmed by this Honorable Court in all respects.

Respectfully submitted,

ADA BURHANS SMITH, Administratrix of the Estate of Sumner I. Smith, Deceased, *pro se*,

J. H. MITCHELL, and

S. D. BISHOP,

of Counsel,

Both of Lawrence, Kansas.

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No. 24805.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1916.

No. 172.

J. D. BOWERSOCK, PLAINTIFF IN ERROR,

VS.

ADA BURHANS SMITH, ADMINISTRATRIX OF THE ESTATE OF SUMNER I. SMITH, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

STATEMENT.

In the spring of the year 1911, J. D. Bowersock, plaintiff in error herein, was and ever since has been the owner of the Lawrence Paper Manufacturing Company doing business in the City of Lawrence in the State of Kansas.

At said time Sumner I. Smith, a mechanical engineer, was employed by the Jones Mandeville Paper Company as superintendent of construction of its mill and the placing of machinery in its building in Milwaukee, Wisconsin. He had attended, for four

years, the Boston School of Technology, which was a school of mechanical and electrical engineering and received a diploma as a graduate of said school in the year 1907, and "was considered fit for almost any kind of a mechanical or electrical engineering position."

From the year 1907 to 1909 he was in charge of a paper mill in Elkhart, Indiana. From the year 1909 to May, 1911, he was superintendent of said paper mill in Milwaukee. In May, 1911, he went to Lawrence, Kansas, and entered into a contract whereby he became the superintendent of the Lawrence Paper Manufacturing Company owned, as aforesaid, by plaintiff in error. Under the terms of his said contract with plaintiff in error by which he became superintendent of said Lawrence Paper Manufacturing Company, it was agreed:

> "That he should have charge of the men, the right to employ and discharge men, to have charge of the operation of the machinery and its ordinary alteration and repair, the *safeguarding* of *machinery*, fire protection, and the *entire charge* of the *mill*, with the exception of improvements involving the expenditure of additional money for *new* machinery" (Trans. of Record, p. 27).

Before accepting said position as superintendent of said Lawrence Paper Manufacturing Company, and in the conversation with the representatives of plaintiff in error, which conversation constituted part of the contract by which said Sumner I. Smith became such superintendent, he stated that if he took charge of the mill as superintendent he wanted to have charge of it; "he didn't want it to be a case of there being *three or four bosses* on the same matter; that, if he took charge of it, he must have charge of the mill, of the men *and of the machinery.*" He was then told, by said representative of plaintiff in error, who made said contract, that he (Sumner I. Smith) "would have *full charge* of the grounds, the *machinery*, and the men, with authority to hire and discharge men, *and to run the plant generally as if he were the owner;* that this included all the methods of manufacture of the paper, the *care* of the machinery, the location and care of the fire fighting appara-

tus, in short, *he was to be in full charge* of the plant," and that "the *operation* of the *mill was entirely in his charge*" (Trans. of Rec., p. 30).

Said representatives of plaintiff in error (Irving S. Hill and Paul Dinsmoor), who made said oral contract by which said Sumner I. Smith became the superintendent of said Lawrence Paper Manufacturing Company, were not paper makers and did not know and were not supposed to know when it was practicable to place guards on the machinery in said plant.

Said Sumner I. Smith, the superintendent, as aforesaid, was the *only* person who possessed knowledge as to when it was practicable to use a guard on machinery. "He was hired for that purpose." He was the only person with authority to decide such questions.

> "So far as the *operation* of the mill was concerned, the superintendent *had absolute control*" (Trans. of Rec. pp. 32-3).

Said plaintiff in error, J. D. Bowersock, was the owner and proprietor of said plant, but "as to the *details* and manufacture of the paper" he had nothing to do with it. He looked "to the *superintendent* of the mill to look after the *details* of paper making and paper machinery, and the *care* of paper machinery."

Said plaintiff in error was also the owner of three other manufacturing plants in the said City of Lawrence, Kansas, to-wit:

Bowersock Mill & Power Co.
Lawrence Iron Works.
Griffin Ice Co.

In order to comply with the statute of Kansas which required all machinery in such plants to be guarded, when *practicable*, plaintiff in error, in addition to contracting with Sumner I. Smith, a conceded expert, to be superintendent of the paper mill, also prepared and caused to be posted in said four plants written notices which read as follows:

"CAUTION.

Every Employe is Urged to be Careful in Order to Avoid Accidents.

If there is any machinery, dangerous place or tool that you think should be safeguarded, repaired or improved, we will regard it a favor if you will report same at once to the office. It is desired that all employes assist in reducing accidents to lowest possible point.

November, 1911.

Bowersock Mill & Power Co.
Lawrence Paper Mfg. Co.
Lawrence Iron Works.
Griffin Ice Co."

Said Sumner I. Smith was not concerned, or in any way connected with any of said plants except said Lawrence *Paper* Manufacturing Company, but as the superintendent of said Paper Manufacturing Company, he posted one of said notices in said paper mill about a week before he, himself was injured, which injury was solely because he failed and neglected to guard a machine in said paper mill of which he was the superintendent, as aforesaid, by virtue of his contract under which he agreed to place guards on all machinery whenever practicable. *His* failure to fulfill that part of his contract (*wherein* he agreed to place such guards when practicable and of which he, because of his superior knowledge, training, ability and experience, was the *sole* judge of its practicability), resulted in his injury and death on the 28th day of November, 1911, without any fault or negligence of plaintiff in error.

He was killed solely because he neglected to guard the machinery, which under the terms of his said contract he had agreed and promised to guard. He was killed only because he negligently failed to fulfill his contractual obligation to plaintiff in error.

In order to recover $10,000 damages for the death of said Sumner I. Smith, his widow, Ada Burhans Smith, as administratrix of his estate, brought suit against said J. B. Bowersock (plaintiff in error herein), in the District Court of Douglas County, Kansas, and on the 18th day of June, A .D. 1913, recovered a verdict for the said sum of $10,000, and judgment was rendered thereon for said sum against said J. D. Bowersock (Trans. of Rec. p. 49).

Her alleged cause of action was based solely on a statute of the State of Kansas Laws 1903, Ch. 356 (Gen. Stat. of Kansas 1909, Secs. 4676-4683), known as the factory act, and the parts applicable to case at bar read as follows:

> "An Act requiring safeguards for the protection of all persons employed or laboring in manufacturing establishments, and providing civil remedies for all persons so engaged, or their personal representatives, in cases where any such person may be killed or injured while employed or laboring in any manufacturing establishment which is not properly provided with the safeguards required by this act.
>
> Be it enacted by the Legislature of the State of Kansas.
>
> Sec. 4. Every person owning or operating any manufacturing establishment in which machinery is used shall furnish and supply for use therein belt-shifters, or other safe mechanical contrivance, for the purpose of throwing on or off belts or pulleys; and wherever it is practicable machinery shall be operated with loose pulleys. All * * * machinery of every description used in a manufacturing establishment shall, where practicable, be properly and safely guarded, for the purpose of preventing or avoiding the death of or injury to the persons employed or laboring in any such establishment; and it is hereby made the duty of all persons owning or operating manufacturing establishments to *provide and keep the same furnished with safeguards as herein specified.*
>
> Sec. 5. If any person employed or laboring in any manufacturing establishments shall be killed or injured in any case wherein the absence of any of the safeguards or precautions required by the act shall directly contribute to such death or injury, the personal representatives of the person so killed, or the person himself, in case of injury only, may maintain an action against the person owning or operating such manufacturing establishment for the recovery of all proper damages. In cases where the action is brought by the personal representative of the deceased, said action shall be governed in all respects not herein provided for by the provisions of the statutes now in force which authorize and regulate the bringing of actions to recover damages in cases where the death of one is caused by the *wrongful act* or *omission* of another; provided, action shall be commenced in the county where the accident occurred.
>
> Sec. 6. In all actions brought under and by virtue of the provisions of this act, it shall be sufficient for the plaintiff to *prove in the first instance*, in order to *establish* the *liability* of the defendant, that the death or injury complained of resulted

in consequence of the *failure* of the *person* owning or operating the manufacturing establishment where such death or injury occurred to provide said establishment with safeguards as re*quired by this act, or* that the failure to provide such safeguard directly contributed to such death or injury.

Sec. 7. Manufacturing establishments, as those words are used in this act, shall mean and include all smelters, oil refineries, cement works, mills of every kind, machine and repair shops, and, in addition to the foregoing, any other kind or character of manufacturing establishment, of any nature or description whatsoever, wherein any natural products or other articles or materials of any kind, in a raw or unfinished or incomplete state or condition, are converted into a new or improved or different form.

Sec. 8. Wherever the expression occurs in this act in substantially the following words: 'Every person owning or operating any manufacturing establishment,' or where language similar to that is used, the word 'person' in that connection shall be held and construed to mean any person or persons, partnership, *corporation*, receiver, trust, trustee, or any other person or combination of persons, either natural or artificial, by whatever name he or they may be called. * * * Approved March 11, 1903."

The statute referred to in Sec. 5, *supra*, which shall govern such actions brought by the personal representative of a deceased person where death is caused by the *wrongful* act or omission *of another*, in all respects not provided for in said act of 1903, provides that the personal representative cannot maintain an action unless such action could have been maintained by the *deceased* had he lived, and is found in Section 6014 of the General Statutes of Kansas, A. D. 1909.

Said plaintiff in error, J. D. Bowersock, as defendant in said trial court, answered said petition by denying the allegations in said petition and further alleged in said answer that said Sumner I. Smith was the superintendent of and in charge of said manufacturing plant; that "as such superintendent said Sumner I. Smith had the *complete* direction of said manufacturing plant, and among other things had the direction, *control, management* of repairs and *safeguarding* of all machinery in said manufacturing establishment;" that "if said Sumner I. Smith was injured on said date and died from said injuries, he was injured by reason of his own

carelessness and negligence, in that while *attempting to adjust* certain squeeze rolls, he carelessly and negligently put his hands into said machinery, and was caught by reason of his said negligent acts, by said machinery and was drawn therein, and suffered the alleged injuries complained of;" that "by reason of *his being superintendent* and having the *entire control* and *management* of said manufacturing plant as herein alleged, assumed the risks of any danger arising from said machinery, *and if* said machinery was *not properly guarded* or screened, said Sumner I. Smith *was responsible therefor*" (Trans. of Rec. pp. 7-8).

The evidence introduced on behalf of said Ada Burhans Smith proved, or tended to prove, that the said superintendent, Sumner I. Smith, was "attempting to adjust" parts of the machine at the time he was killed. Said J. D. Bowersock demurred to the evidence and said demurrer was overruled by the trial court and duly excepted to (Trans. of Rec. p. 25).

Said J. D. Bowersock then introduced positive evidence proving or at least strongly tending to prove, and from which the jury if it had been permitted to consider said evidence in arriving at a verdict could have found, that the allegations, in said answer (relative to it being the sole duty of said Sumner I. Smith, by virtue of his contract with said J. D. Bowersock, when the said Smith became superintendent of said plant), were true.

Said evidence introduced on behalf of J. D. Bowersock was positive and uncontradicted and was to the effect that said Smith, as superintendent had *entire charge and control* of the plant, which *he* had *entered into a contract* to operate as if *he* were the *owner* thereof; that *he* was the *only* person competent, or qualified, to determine when it was *"practicable"* to *place guards* on the machinery, as required by said Kansas statute; that because of his high qualifications and superior knowledge and experience, he had *absolute control* of *placing guards* on *machinery*, when "practicable" and *he had obligated himself to do so*, by entering into the contract which made him the superintendent of said plant, as hereinbefore stated.

The alleged cause of action was based solely on the fact that the machinery, which he was "attempting to adjust," at the time of his injury, was *not* guarded.

At the close of all the evidence said J. D. Bowersock requested the trial court to give to the jury a peremptory instruction that the jury should find a verdict in favor of said J. D. Bowersock, plaintiff in error herein.

Said requested instruction the trial court refused to give, and to which ruling and action of said trial court, the said J. D. Bowersock duly excepted (Trans. of Rec. p. 41).

Said J. D. Bowersock, as defendant in said trial court, then requested several instructions to be given the jury in substance as follows: that if the jury found from the evidence that the injury and death of said Sumner I. Smith was *not* caused by the negligence of said defendant the verdict must be for said defendant; that if the jury found from the evidence that said Smith was the superintendent in charge of said paper mill, "having power to hire and discharge workemen, the direction and *control* of *machinery* and the making of all necessary repairs and the placing of all necessary safeguards about the machinery," then *he* stood *in* the *place* of said *defendant*, and was a vice-principal and could *not* recover *for his own negligence*, if any, in *failing* to *place* a *guard* on the *machinery* where he was injured, and the verdict should be for said defendant; that if they found from the evidence that said *Smith had* the *control and operation* of the machinery in said paper mill, and it was *his duty* to *safeguard all machinery*, and that *he neglected* to *safeguard* said machinery at the place where he was killed, then the verdict should be for said defendant; that if they found from the evidence the said Sumner I. Smith, as superintendent of said paper mill, had *complete* direction and control of said plant, the making of all safeguards and repairs to the machinery, and that he failed and neglected to put a guard where it was practicable, which failure contributed to his injury and subsequent death, then, in that event, his administratrix herein cannot recover because his negligent failure to put up the guard, if it were practicable, was his own

wrong and the verdict should be for said defendant (Trans. of Rec. pp. 41-3).

Said trial court refused to give said instructions requested by said J. D. Bowersock, to which refusal and action of the trial court said J. D. Bowersock then and there duly excepted (Trans. of Rec. p. 44).

Thereupon the said trial court instructed the jury that if the use of a guard were practicable it was the duty of said *J. D. Bowersock* to properly and safely guard the machine on which said Sumner I. Smith was injured, in order to prevent injury to said Sumner I. Smith when he, as superintendent, was *in* the *act* of *adjusting* (or as the petition alleged attempting to adjust) said machine; and further instructed the jury that the fact of his being the superintendent of the establishment, with authority to repair or *"safeguard machinery* will not constitute a defense in this action," * * * "as *no* negligence on *his* part contributing to his injury and death is a defense in this action" (Trans. of Rec. p. 47).

To the giving of said instructions, the said J. D. Bowersock then and there duly excepted, (Trans. of Rec. p. 38), for the reason that said instructions so given by the court deprived him of property without due process of law and denied him the equal protection of the law in violation of the 14th Amendment to the Constitution of the United States.

Said J. D. Bowersock also duly excepted to the refusal of the trial court to give the said instructions requested by him, as being in violation of said 14th Amendment to the Constitution of the United States (Trans. of Rec. p. 44).

After the jury returned a verdict and a judgment was rendered thereon against plaintiff in error, J. D. Bowersock, he, in due time, on the 21st day of June A. D., 1913, filed his motion for a new trial (Trans. of Rec. p. 49), which motion was overruled by the trial court on the 17th day of January A. D., 1914, and duly excepted to by said J. D. Bowersock (Trans. of Record p. 50).

Subsequently and in due time an appeal was duly taken by said J. D. Bowersock in said cause to the Supreme Court of the State of

Kansas (Trans. of Rec. p. 50), which court was and is the highest court of law or equity in the State of Kansas in which a decision could be had in said suit between the parties thereto aforesaid.

On the 10th day of April, A. D. 1915, said Supreme Court of the State of Kansas affirmed the judgment and ruling of said District Court of Douglas County, Kansas (Trans. of Rec. pp. 54-5).

Afterwards and in due time on the 29th day of April, A. D. 1915, said J. D. Bowersock, appellant in said Supreme Court of the State of Kansas, filed in the office of the clerk of said Supreme Court of the State of Kansas, a petition for a rehearing (Trans. of Rec. pp. 62-70), which was denied by said Supreme Court of Kansas on the 15th day of May, A. D. 1915 (Trans. of Rec. p. 70).

On the 3d day of June, A. D. 1915, said J. D. Bowersock, plaintiff in error herein, presented his petition for writ of error, with assignments of error, to the Honorable William A. Johnston, Chief Justice of said Supreme Court of the State of Kansas, which petition was duly allowed and thereby the cause comes into this court (Trans. of Rec. pp. 70-85).

ASSIGNMENTS OF ERROR.

Assignments of error urged by plaintiff in error, appellant in State Court, are as follows:

1. The Supreme Court of the State of Kansas erred in rendering said final judgment affirming the finding and judgment of the District Court of Douglas County, Kansas, in and by which said Appellant, this Plaintiff in Error was adjudged to pay to said Appellee, the Defendant in Error the sum of Ten Thousand ($10,000) Dollars and the costs of said suit.

II. The said Supreme Court of the State of Kansas erred in holding and adjudging that the said judgment rendered against said appellant by the District Court of Douglas County, Kansas, finding the said Appellant in said cause and Plaintiff in Error herein to be indebted to said Appellee and Defendant in Error herein, in the sum of Ten Thousand ($10,000) Dollars and adjudging that said Appellant pay to said Appellee the said sum of Ten Thousand ($10,000) Dollars and the costs in said suit, was a valid and legal judgment.

III. The said Supreme Court of the State of Kansas erred in holding that the District Court of Douglas County, Kansas, ruled correctly and that said trial court did not err in overruling the motion for a new trial filed by said Appellant in said District Court of Douglas County, Kansas.

IV. The said Supreme Court of the State of Kansas erred in not reversing the judgment of the trial court, to-wit: the District Court of Douglas County, Kansas, and in not giving to said Appellant, the Plaintiff in Error herein, his rights asserted and claimed by him under that portion of the Fourteenth Amendment to the Constitution of the United States which provides:

'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprives any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.'

V. The said Supreme Court of the State of Kansas erred in holding and adjudging that Sections 4676 to 4683 inclusive, of the General Statutes of Kansas 1909, the same being Chapter 356 of the acts of the Legislature of the State

of Kansas A. D. 1903, created a legal liability in favor of said Appellee against said Plaintiff in Error, under the evidence in said cause, and in neglecting and refusing to hold, decide and adjudge that said Kansas Statutes, as construed, applied, put in operation and enforced by said District Court of Douglas County, Kansas, in said cause, against said Plaintiff in Error, was not in conflict with that portion of the Fourteenth Amendment to the Constitution of the United States which provides:

'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.'

VI. The said Supreme Court of the State of Kansas erred in overruling and denying Appellant's petition for a re-hearing filed in said court, and likewise erred in refusing to reverse said cause without remanding and in refusing to enter judgment for appellant on account of the matters aforesaid, and on the undisputed facts disclosed by the record.

VII. The said Supreme Court of the State of Kansas erred in refusing to hold on the undisputed facts disclosed by the record, the deceased, Sumner I. Smith, lost his life by reason of his own wrongful negligence without any fault or negligence of said appellant, and that appellee was not entitled to a judgment against said appellant in said cause.

VIII. The said Supreme Court of the State of Kansas erred in sustaining and affirming the ruling of the District Court of Douglas County, Kansas, wherein said District Court refused to give an instruction to the jury, requested by Plaintiff in Error, who was defendant in said District Court, which reads as follows:

'The jury is instructed that under the evidence in this case the plaintiff is not entitled to recover and your verdict must be for the defendant.'

IX. The said Supreme Court of the State of Kansas erred in sustaining and affirming the ruling and action of the District Court of Douglas County, Kansas, wherein said District Court refused to give an instruction to the jury, requested by Plaintiff in Error, who was defendant in said District Court, which reads as follows:

'The jury is instructed that before you are justified in rendering a verdict for the plaintiff, you must be satisfied by a preponderance of the evidence, that the exact negligence alleged in plaintiff's petition has been proven, and you are not authorized to speculate or guess, but must be satisfied from

the evidence that the alleged injuries of the deceased, Sumner I. Smith, were due to and caused by the negligence of the defendant as alleged in plaintiff's petition and if you find that the alleged injuries resulting in the death of Sumner I. Smith was not caused by the negligence of the defendant herein, as alleged in plaintiff's petition, then the plaintiff has failed to establish her case, and your verdict should be for the defendant.'

X. The Supreme Court of the State of Kansas erred in sustaining and affirming the ruling and action of the District Court of Douglas County, Kansas, wherein said District Court refused to give an instruction to the jury, requested by plaintiff in error, who was the defendant in said District Court, which reads as follows:

'The jury is instructed that if they believe, from a preponderance of the evidence, that Sumner I. Smith, the deceased, was the superintendent in charge of the manufacturing plant of the defendant; having power to hire and discharge workmen, the direction and control of the machinery and the making of all necessary repairs and the placing of all necessary safeguards about the machinery, then the said Sumner I. Smith stood in the place of the defendant, J. D. Bowersock, and was a vice-principal, and cannot recover for his *own* negligence, if any, in failing and neglecting to place a guard on the machinery where he was injured, and your verdict should be for the defendant.'

XI. The said Supreme Court of the State of Kansas erred in sustaining and affirming the ruling and action of the District Court of Douglas County, Kansas, wherein said District Court refused to give an instruction to the jury, requested by plaintiff in error, who was the defendant in said District Court, which reads as follows:

'The court instructs the jury that if they believe from a preponderance of the evidence, that Sumner I. Smith had the control and operation of the machinery in defendant's mill, and had the power to employ and discharge men, and it was his duty to safeguard all machinery, then if he, the said Sumner I. Smith, neglected to safeguard said machinery at the point where he was injured and killed, she cannot recover, and under these circumstances you should find for the defendant.'

XII. The said Supreme Court of the State of Kansas erred in sustaining and affirming the ruling and action of the

District Court of Douglas County, Kansas, wherein said District Court refused to give an instruction to the jury, requested by plaintiff in error, who was the defendant in said District Court, which reads as follows:

'The court instructs the jury that if they believe from a preponderance of the evidence that Sumner I. Smith had the control and operation of the machinery in defendant's mill, and had the power to employ and discharge men, and it was his duty to safeguard all machinery, then, if the said Sumner I. Smith failed and neglected to put up a guard at the place where he was injured, this was his negligence, and she cannot recover and your verdict must be for defendant.'

XIII. The said Supreme Court of the State of Kansas erred in not upholding and sustaining the claim and contention of appellant in said court, that the said Kansas Statute on which, the alleged cause of action of appellee was based, as construed, applied and enforced by the District Court of Douglas County, Kansas, and affirmed by said Supreme Court was and is in conflict with and repugnant to that portion of the Fourteenth Amendment to the Constitution of the United States, which provides:

'No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any perwithin its jurisdiction the equal protection of the law.'

XIV. Said Supreme Court of the State of Kansas erred in deciding, holding and adjudging that under the evidence in said cause there is nothing in the relation of said parties to said suit, or in the circumstances of the case to absolve appellant, plaintiff in error, from liability for the death of Sumner I. Smith, and likewise erred in sustaining the ruling and action of the District Court of Douglas County, Kansas, in its refusal to permit, or allow, the jury in said cause to consider the evidence introduced by said plaintiff in error showing, or at least strongly tending to show, that the said Sumner I. Smith was killed solely because of his own wrongful negligence, without any fault of said plaintiff in error, and because of the wrongful neglect of the said Sumner I. Smith to guard machinery and thereby perform the obligations of his contract of employment, entered into by him with said plaintiff in error, under the terms and conditions of whic' contract in order that said Kansas Statute might be complied with, the

said Sumner I. Smith, as superintendent and vice-principal, had obligated himself to guard all machinery when practicable, including the machine on which he was killed solely because he wrongfully neglected to place a guard thereon, without any negligence on the part of plaintiff in error, who performed every duty he owed to said Sumner I. Smith, thereby depriving plaintiff in error of a legitimate defense guaranteed to him by the Fourteenth Amendment to the Constitution of the United States, by abrogating the contract of employment between said Sumner I. Smith and plaintiff in error, and taking property without due process of law from plaintiff in error, who was not at fault, and giving it to the representative of Sumner I. Smith, who was the only party at fault.

XV. Said Supreme Court of the State of Kansas erred in affirming the rulings and action of the District Court of Douglas County, Kansas, in not allowing or permitting the jury, which rendered the verdict in favor of defendant in error against plaintiff in error, to consider the evidence introduced on behalf of plaintiff in error, proving, or at least tending strongly to prove, and from which evidence said jury could have found did prove that Sumner I. Smith, at the time he became superintendent of the manufacturing establishment of plaintiff in error in which he was killed without any fault or negligence of plaintiff in error, solely because he, Sumner I. Smith, had wrongfully neglected to place safe guards on the machine, which said Kansas Statutes (Chap. 356, laws of 1903), provided should be safe guarded, had agreed in his contract of employment with plaintiff in error, to safely guard, which rulings and action of said District Court of the State of Kansas erroneously deprived said plaintiff in error of the benefit of the binding and legal obligations of said Sumner I. Smith in said contract of employment entered into by and between said Sumner I. Smith and said plaintiff in error, and abrogated said contract of employment to the great prejudice of said plaintiff in error, who had fulfilled all the obligations of said contract on his part, and who, by said rulings and actions of said courts of the State of Kansas, was deprived, in said suit, of a valid defense, to which he was and is entitled under the law of the land, and in violation of Section 1, Article Fourteen of the Amendment to the Constitution of the United States, which provides that no state shall deprive any person of a right to make such contracts, nor of his property without due process of law, and that any act of the legislature of a state which provides that

machinery in factories must be safe-guarded when practicable, and which statute the highest court of the state construes, applies and enforces, in such a manner as will not permit the owner of such a factory, when sued for damages for the death of a superintendent and vice-principal, to defend himself in such suit, by having the jury consider positive evidence showing, or strongly tending to show, and from which the jury could find did show: (1) that such superintendent and vice-principal was killed solely because of his own wrongful negligence, and (2) because such superintendent and vice-principal had failed to perform his duty of guarding a machine which, under his contract of employment, he had obligated himself to safe-guard, in order that said state statute would be complied with, and (3) that such owner was not at fault, in any manner, and had performed all of his obligations of the said contract by which the said superintendent and vice-principal was employed, is unconstitutional and void to the same extent as if such act of the state legislature had expressly declared such defenses could not be interposed by the defendant owner in such suits, for, whether such a statute is or is not repugnant to the Constitution of the United States must be determined from the natural effect of such statutes when put in operation, and not from their proclaimed purpose.

For the foregoing judicial errors, and each of them, affecting the merits of said cause, appellant (plaintiff in error) prays a reversal of the said judgment of the said District Court of Douglas County, Kansas, and the judgment of affirmance thereof by the Supreme Court of Kansas."

ARGUMENT.

The specifications of error above set forth may be divided into two groups:

FIRST, those based upon the decision of the Supreme Court of Kansas, wherein said court erred in affirming the rulings, actions and judgment of the District Court of Douglas County, Kansas, which refused to direct a verdict for defendant, at the close of all the evidence; and which refused to set aside the verdict of the jury and grant a new trial and entered judgment on the verdict in said trial court against the defendant, J. D. Bowersock, plaintiff in error herein. Under this head we class Specifications of Error, Nos. 1 to 8, inclusive.

SECOND, those based upon the decision of the Supreme Court of Kansas wherein said court erred in sustaining and affirming the actions and rulings of the District Court of Douglas County, Kansas, which refused to give to the jury instructions, requested by plaintiff in error herein, who was defendant in said District Court, numbered 2, 4, 5 and 6, relative to it being the duty of the superintendent, Sumner I. Smith, to guard all machinery, including the machine on which he was injured and killed solely because *he* did *not* guard said machine, which instructions were and are as follows:

> "No. 2. The jury is instructed that before you are justified in rendering a verdict for the plaintiff, you must be satisfied by a preponderance of the evidence, that the exact negligence alleged in plaintiff's petition has been proven, and you are not authorized to speculate or guess, but must be satisfied from the evidence that the alleged injuries of the deceased, Sumner I. Smith, were due to and caused by the negligence of the defendant as alleged in plaintiff's petition, and if you find that the alleged injuries resulting in the death of Sumner I. Smith were not caused by the negligence of the defendant herein, as alleged in plaintiff's petition, then the plaintiff has failed

to establish her case, and your verdict should be for the defendant (Trans. of Rec. p. 41).

No. 4. The jury is instructed that if they believe, from a preponderance of the evidence, that Sumner I. Smith, the deceased, was the superintendent in charge of the manufacturing plant of the defendant, having power to hire and discharge workmen, the direction and control of the machinery and the making of all necessary repairs and the placing of all necessary safeguards about the machinery, then the said Sumner I. Smith stood in the place of the defendant, J. D. Bowersock, and was a vice-principal, and cannot recover for his own negligence, if any, in failing and neglecting to place a guard on the machinery where he was injured, and your verdict should be for the defendant (Trans. of Rec., p. 42).

No. 5. The court instructs the jury if they believe from a preponderance of the evidence, that Sumner I. Smith had the control and operation of the machinery in defendant's mill, and had the power to employ and discharge men, and it was his duty to safeguard all machinery, then if he, the said Sumner I. Smith, neglected to safeguard said machinery at the point where he was injured and killed, he cannot recover, and under these circumstances you should find for the defendant (Trans. of Rec., p. 42).

No. 6. The court instructs the jury that if they believe from a preponderance of the evidence that Sumner I. Smith had the control and operation of the machinery in defendant's mill, and had the power to employ and discharge men, and it was his duty to safeguard all machinery, then, if the said Sumner I. Smith failed and neglected to put up a guard at the place where he was injured, this was his negligence, and he cannot recover, and your verdict must be for the defendant" (Trans. of Rec., p. 42).

Under this head, we class Specifications of Error Nos. 9 to 15, inclusive.

I.

Said Supreme Court of Kansas erred in sustaining and affirming the rulings and actions of the District Court of Douglas County, Kansas, in refusing to give the peremptory instruction requested by defendant, in said trial court, and in not directing a verdict for said defendant at the close of all the evidence.

FACTS.

At the close of all the evidence, the facts proved were substantially as follows:

That J. D. Bowersock, plaintiff in error herein, was the owner of the Lawrence Paper Manufacturing Company, generally referred to in the record of this case as a paper mill, and Sumner I. Smith at the time of his death was the superintendent of said paper mill at a salary of $1800 a year (Trans. of Rec. p. 10).

Said J. D. Bowersock also owned three other manufacturing establishments named as follows: Bowersock Mill and Power Co., Lawrence Iron Works and Griffin Ice Company (Trans. of Rec. p. 31).

In the spring of 1911 with authority from Mr. Bowersock (Trans. of Rec. p. 26), Mr. Irving S. Hill, who was manager for Mr. Bowersock (Trans. of Rec. p. 27), met Sumner I. Smith in Chicago and they had an interview relative to Mr. Smith taking charge of the *paper mill* as superintendent. It was there agreed that it would be better for Mr. Smith to go to Lawrence, Kansas, and inspect said paper mill and then definitely decide as to whether or not he would take the position as superintendent. Shortly, thereafter, Mr. Smith went to Lawrence and in conversation with Mr. Hill as to what would be his authority and duty was told: "that he (Smith) should have charge of the men, the right to employ and discharge men, to have charge of the *operation* of the *machinery* and its ordinary alteration and repair, the *safeguarding* of *machinery* * * * and the *entire charge* of the *mill*, with the exception of improvements involving the expenditure of additional money for *new* machinery" (Trans. of Rec. p. 27).

During that conversation, in which the amount of his salary was agreed upon, Mr. Smith stated that, if he was going to take charge of the paper mill, he wanted to have charge of it, and did not want it to be a case of three or four bosses; that if he took charge of the mill he must have charge of it, if he was to be the superintendent, Mr. Smith was then informed that *he (Smith)* "would have *full charge* of the grounds, the building, the *machinery* and the *men,* with *authority* to hire and discharge men, and to *run* the *plant* generally *as if he were the owner;* that this included all the methods of manufacture of paper, the *care* of the *machinery* * * * —in short, that he was to be in *full charge* of the *plant,* * * * that the *operation* of the mill was *entirely in his* charge."

He was also told that *he* "was to place *safeguards* at any point at any time where they could be put without interfering with the operation of the machine" (Trans. of Rec. p. 30).

With such understanding and agreement he took charge, as superintendent, of said paper mill and operated it until some time in the summer, when it was shut down for a general overhauling of which he had charge. He stated that, *before* putting on guards he wanted to do the *construction* work first. The original plan for repairs or changing of the machinery had previously been made by a consulting engineer, by the name of Carey; but that plan was changed by Mr. Smith after he took charge of the paper mill (Trans. of Rec. p. 31).

Before going to Lawrence and taking charge of said paper mill, as superintendent, he had been superintendent of construction and the placing of machinery in a paper mill in Milwaukee, Wisconsin. He was a graduate of the Boston School of Technology, a school of mechanical and electrical engineering, and prior to his having charge of the paper mill in Milwaukee he had charge of his father's paper mill in Elkhart, Indiana, and was exceptionally well qualified to be superintendent of a paper mill, or fill any kind of a mechanical or electrical enigneering position (Testimony of Ada B. Smith, Trans. of Rec. pp. 23-4).

Mr. Bowersock testified in substance: that he authorized his manager, Mr. Hill, to make arrangements with Mr. Smith for him (Smith) to take charge of the paper mill as superintendent; that Mr. Smith did become such superintendent and was to "look after the machinery and *safeguard it*"; that the duties of Mr. Smith were also "to make paper, to look after the *men and affairs* of the *mill;* to look after the quality and quantity of the paper put out, look after the machinery, and generally to look after the mill, to superintend the plant and to have *direct control* of the paper mill (Trans. of Rec. 26).

Cross Examination.

"Q. You had the sole management of that concern, didn't you, Mr. Bowersock?

A. Well, I would say that that question would call for some explanation. There is a sense in which I can answer that question 'Yes, along certain lines;' but as to the *details* of all that business, I was *not.* I am not called in for every detail that may come up there.

Q. But as a matter of fact, you are and were the sole owner and manager of that paper manufacturing concern?

A. In the sense that I control it, I presume that is a fair statement.

Q. And in the employment of every person in that paper manufacturing establishment you *reserve* the right to direct his movement, do you not?

A. I don't think that is fully correct. * * *

Q. And in the *construction* of that *mill* you took the thing up in *detail,* did you not?

A. *No.*

Q. Like you do with all the other buildings that belong to you?

A. *No,* not in *detail;* and if you refer to little repairs that were taken up with me generally—not in detail; only very generally.

Q. Do you not, and did you not, have the plans and specifications presented to you in the repairing of the mill, and the extension of the same?

A. Oh, at times I *may have seen* the blue prints; *I cannot say positively* that I have; I *may* have in *one instance* seen *one* blue print with reference to some special thing that was required" (Trans. of Rec. p. 26).

Mr. Bowersock testified, also, that his assistants, Mr. Hill and Mr. Dinsmoor, were not paper makers.

> "Q. All persons employed in that establishment, as to the running of it, as to the employment of men, and as to the *details* of the machinery were directly under these men, weren't they?
> A. *No,* not as broadly as you put it. I look more to the *superintendent* of the mill to look after the details of *paper making* and paper machinery, and the *care* of the paper *machinery* than I do to both of these other men combined.
> Q. But you are first of all, the manager and proprietor, with power to direct and regulate the manufacture of paper and all the details of the business, everything down there, are you not?
> A. *No,* you make that too broad; as to *details* and the *manufacture* of the *paper;* I probably may be said to have *nothing* to do with it" (Trans. of Rec. p. 27).

Mr. Dinsmoor, assistant to Mr. Bowersock, testified also that the superintendent, Sumner I. Smith, had "absolute control" of the operation of the *paper* mill. On cross examination he testified as follows:

> "Q. When you told Mr. Smith of the different things he was to *have charge of,* do you mean to say to this jury, that you as assistant manager *relieved yourself* of *all power* and responsibility in doing so?
> A. So far as the operation of the *mill* was concerned, the superintendent has *absolute control.*
> Q. Then if you were to go out into that mill, you mean to say that as assistant manager of the Lawrence *Paper* Manufacturing Company, if you saw things going wrong there that you would have no power to correct them?
> A. I didn't say so.
> Q. Well, would you?
> A. Certainly I would, but it *would depend* upon *what kind* of a *thing* it was.
> Q. Then if you saw machinery that was not *guarded* as *required* by the *laws* of this state for the safety of employes, you would have the power to say to Mr. Smith that you wanted him to guard the machine, wouldn't you?
> A. I am not presumed to know where those guards belong, *it isn't my line.* * * *
> If there came up a question of power as to the operation

of the mill, *his* word, *his* opinion would go against mine *every time.*

Q. You wouldn't have *nothing* to do with it?

A. Not if he said it was *practical* or proper; *his* ruling would be preferred.

Q. If you knew his advice would be wrong, would you say that *his* word would go?

A. I am not a *paper* maker; *he* was hired for *that purpose.*

Q. Answer my question?

A. I am endeavoring to.

Q. (Question read)?

A. That is my answer. You wanted to know if in *my* opinion something was *wrong* I had the power to do what *I* thought proper, and I stated to you that *I* was *not* a practical *paper* maker, and my opinion would *not* govern as *against his"* (Trans. of Rec. pp. 32-3).

On the 28th day of November, 1911, while Sumner I. Smith, as superintendent of the paper mill, owned by plaintiff in error, was *adjusting* the parts of a machine called squeeze rolls he was injured and killed. The machine consisted of two rolls a few inches apart called the "dry rolls" and the "dryer felt rolls" which run together, like an ordinary cloths wringer, and was used to squeeze the water out of wet paper, which was guided by the laborer who performed that kind of work (Trans. of Rec. p. 11). About three feet from said rolls was a press used also to press water out of the paper (Trans. of Rec. p. 18). Laborers who were working in the paper mill saw Mr. Smith near the squeeze rolls; heard some one scream and then found his body between the "dryer felt roll" and the "dry roll." (Trans. of Rec. p. 17). Just exactly how he happened to get between the said rolls is not shown by the evidence; but the petition alleged that he, "while attempting to *adjust* the aforesaid squeeze rolls, fell and was caught between the dry rolls and dryer felt rolls and was then and there fatally injured" (Trans. of Rec. p. 7).

It was the duty of said Sumner I. Smith to "adjust" said squeeze rolls, which duty included the safeguarding of them, if practicable, as is shown by the positive and uncontradicted evidence heretofore referred to, *in order* that the laborers *who were to work*

with *said squeeze rolls* might not be subjected to unnecessary danger.

Evidence, on behalf of defendant in error, tended to show that it was "practicable" to have a guard on said squeeze rolls, and evidence, on behalf of plaintiff in error, tended to show that the use of a guard on said squeeze rolls was not "practicable." By the general verdict of the jury, the finding of the jury was that it was "practicable" to have used a guard on said squeeze rolls which Sumner I. Smith was "adjusting" when he was killed. The evidence does not show just what kind of an adjustment he was attempting to make, and it may be that he was "attempting to adjust" the squeeze rolls so that he could place a safe guard on them for protection of any laborer who might work there when he, himself, was accidentally drawn between them and killed. He was not putting any paper between the rolls, but, as alleged in the petition of defendant in error, "while attempting to *adjust* the aforesaid squeeze rolls, fell and was caught between" them (Trans. of Rec. p. 7).

According to the positive and uncontradicted testimony of witnesses Bowersock, Hill and Dinsmoor, it was the *duty* of *Mr. Smith to adjust* or guard all the machinery, whenever practicable, and *he* was the *sole judge* of its *practicability*, under his *contract by which* he became *superintendent* of said paper mill and by which he in effect contracted to relieve Mr. Bowersock of that statutory duty, in so far as that duty was owing to Mr. Smith.

There was no claim made, by defendant in error, that the squeeze rolls were defective, or that there was any liability against plaintiff in error under the common law.

The alleged cause of action was based *solely* on the said Kansas statute known as the factory act, which provides that the owner or operator of a manufacturing establishment must keep all machinery safely *guarded* "where practicable" (Trans. of Rec. p. 21).

The petition of defendant in error, plaintiff in the trial court, alleged "that by reason of the death of her said husband, Sumner I. Smith, on *account* of the *failure* of said *J. D. Bowersock* to prop-

erly guard" the said squeeze rolls, which said Sumner I. Smith was "attempting to *adjust*" she was damaged in the sum of $10,000 (Trans. of Rec. p. 7). The failure of Mr. Bowersock to *guard* the said squeeze rolls was the *only* ground on which a recovery is sought for the injury to said Sumner I. Smith who had *obligated himself to Mr. Bowersock* to do the very thing which is alleged was not done; and because that which *Mr. Smith agreed to do,* for Mr. Bowersock, was *not* done Mr. Smith was fatally injured and Mr. Bowersock is asked to respond in damages for such injury to Mr. Smith who received his injury solely on account of his failure to fulfill his contract *without any breach of duty by Mr. Bowersock to Mr. Smith.*

Plaintiff in error herein, J. D. Bowersock, contends that he is not liable, under such a state of facts, for the fatal injury to said Sumner I. Smith and cannot legally be made liable by any statutory enactment which provides, or is so applied or enforced that the *property* of *one* man, who is *not at fault* and committed *no wrong,* may be given to another man *who* is the *only* person *at fault* and who wrongfully fails to do *his duty and* is injured solely because of *his* wrongful failure to do that duty, which he has *contracted to do* and which he is *paid* to do *by* the *man who* is *not* at fault.

Said plaintiff in error contends that the *operation* and *effect* of the said Kansas statute, on which the alleged cause of action of defendant in error is based, *as construed, applied* and *enforced by* said *courts* of the state of Kansas, takes property from him who was *not* guilty of any *wrong* and gives it to defendant in error, the personal representative of Sumner I. Smith, who was killed solely because of *his own* negligent failure to *guard a machine* (the squeeze rolls) which he had *obligated himself* to guard by his contract with plaintiff in error, in order that said Kansas statute might be complied with; that the operation and effect of said Kansas statute, as construed, applied, put in operation and enforced by the State of Kansas, by and through its said courts is repugnant to and in conflict with that portion of the Fourteenth Amendment to the Constitution of the United States which provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Plaintiff in error claimed and asserted his constitutional rights, given to him by said Fourteenth Amendment to the United States Constitution, both in the trial court and in the highest court of the State of Kansas in several different modes, as follows:

(1) By excepting to the *refusal* of the *trial court* to *give* to the jury said *instructions* hereinbefore referred to and quoted (Nos. 1, 2, 4, 5 and 6, Trans. of Rec. pp. 41-2), for the reason that said refusal to give to the jury said instructions *deprived him* of *property without due process of law,* in violation of said Fourteenth Amendment, and for the further reason that such refusal of the court to give said requested instructions *denied him* of the *equal protection of the law;* and that said Kansas statute, on which the alleged cause of action was based, and the authority exercised thereunder are repugnant to the constitution and laws of the United States and particularly the said Fourteenth Amendment to the United States Constitution (Trans. of Rec. p. 44).

(2) By excepting to the *instructions given* by the *trial court* for the reasons that they deprived said plaintiff in error of his *property without due process of law* and *denied* him of *the equal protection of the law* and that the authority exercised under said state statute were all in violation of said Fourteenth Amendment to the United States Constitution (Trans. of Rec. p. 48).

(3) By motion for a new trial based on the ground that he had been deprived of his said constitutional rights (Trans. of Rec. p. 49).

(4) By appealing said cause, after the trial court overruled said motion for a new trial to the said Supreme Court of Kansas, from the order of the trial court in overruling said motion (Trans. of Rec. pp. 50-4).

(5) By petition for rehearing filed in said Supreme Court of the State of Kansas, in which said plaintiff in error again invoked said Fourteenth Amendment to the Constitution of the United States for the protection of rights which it secures to him against the operation and *effect* of said Kansas statute, *construed, applied and enforced* by the state of Kansas by and through its said courts in case at bar (Trans. of Rec. pp. 62-70).

Said plaintiff in error, J. D. Bowersock, still contends that the *operation* and *effect* of said statute of the State of Kansas, as *construed, applied,* and *enforced,* in case at bar by said state, by and through its said courts is in violation of, and repugnant to that portion of the said Fourteenth Amendment to the court of the United States above quoted:

(1) Because it takes his property without due process of law.

(2) Because it denies him of the equal protection of the law.

(3) Because it takes property from him, who was not at fault and committed no wrong and gives it to the representative of said Sumner I. Smith when said *Smith* was the only person at fault and who wrongfully failed to do his duty of safeguarding the "squeeze rolls" on which he was injured solely because *he neglected* to *fulfill* the obligations of *his* contract with plaintiff in error entered into when he became superintendent of said paper mill.

(4) Because it takes his property when he is not at fault and has performed every duty he owed to said Sumner I. Smith, and gives to the representatives of said Smith who was the only person at fault.

(5) Because said statute of Kansas (which provides in Section 6, that the owner is *prima facie* liable if the evidence shows the death resulted in consequence of the failure of the owner to guard a machine) is applied and enforced in such a manner in case at bar as to create a *conclusive* liability against the owner and denies the right of the owner to *show* that the experienced superintendent, who was killed, had full charge of the paper mill, had contracted to guard the machinery when practicable, and that said superintendent was killed solely on account of his own failure to guard the machine, without any fault on the part of plaintiff in error, or the failure of any duty which plaintiff in error owed *said superintendent.*

(6) Because "the *operation* and *effect* of said statute, as applied and enforced by the state," in case at bar, does *not* give plaintiff in error the right to have the jury consider material facts which the record discloses were shown by positive and uncontradicted evidence, in his defense and thereby deprives him of a legitimate defense to the same extent as if said *statute* had *expressly provided* that such a defense could not be interposed by said plaintiff in error.

(7) Because said statute is unconstitutional and void as to *corporations* which are owners of the *same kind* of a paper mill, for a corporation itself if owner *cannot* be compelled to *guard* machinery, and would therefore be *entitled to show*, as a valid *defense*, that *its* superintendent, who was injured solely on account of *his* own failure to guard a machine, which he had contracted with the *corporation* to guard when he became such superintendent; and the declared purpose of the state legislature in Section 8 of said statute is that corporations *are included*, which necessarily means that *corporation owners*, must either have machines guarded by some *person who contracts to guard* them, or that if the *owner* is a *corporation* the machinery need *not* be guarded.

(8) Because the *"operation* and *effect* of said statute as *applied and inforced* by the state," denied plaintiff in error, J. D. Bowersock, the *"right to contract"* with Sumner I. Smith by which said Smith was to operate the paper mill "as if he were the owner," and by which said Smith, an expert superintendent, was in duty bound to guard machinery when practicable; and, yet, *necessarily* gives to any *corporation*, which is the owner of the *same kind* of a paper mill the *right* to make the *same kind of a contract*, as a *corporation, itself*, cannot possibly *guard* a machine and *must*, therefore, delegate that statutory duty to some natural person.

(9) Because it gives an owner, *if a corporation*, when sued on a cause of action based solely on said statute the right to have a jury consider *its contract* with a *superintendent*, when the contract is introduced in evidence, as a *valid defense*, to show that it was not the duty of the *corporation, itself*, as *owner*, to *guard a* machine on which such *superintendent* was injured, but that it was the duty of such *superintendent under* his *contract* to guard said machine; and yet arbitrarily denies, *plaintiff in error, J. D. Bowersock*, the *same opportunity* of the *same defense*, when sued on the *same kind* of a cause of action based on the *same statute*—thus denying to *plaintiff in error* the "equal protection of the law," as well as depriving him of his liberty and property "without due process of law."

THE LAW.

"The contention that a state law as administered and justified by the highest court of the state violates the Federal Constitution presents a Federal question which will support a writ of error from the Federal Supreme Court to the state court, although the state law *as written is not* attacked."

(First proposition of syllabus in the case of *Myles Salt Co.* v. *Board of County Commissioners, and St. Mary Drainage District, et al.*, 239 U. S. 478, 36 Sup. Ct. Rep. 204).

When a person invokes the Federal Constitution for the protection of rights which it secures to him against unreasonable and arbitrary enactments of a state legislature, the determination of the question as to what his rights in such matters are, does not "depend upon the *form* of the state law, or even upon its declared purpose, but rather upon its *operation* and *effect* as applied and enforced by the state; and upon these matters this court cannot in the proper performance of its duty, yield its judgment to that of the state court."

"2. A statutory provision which is not a legitimate police regulation cannot be made such by being placed in the same act with a police regulation, or by being enacted under a title that declares a purpose which would be a proper object for the exercise of that power. * * *

4. The several states are debarred by U. S. Const., 14th Amend., from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object, and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot, of itself, be denominated public welfare, and treated as a legitimate object of the police power."

T. B. Coppage v. *State of Kansas*, 236 U. S. 1, 35 Sup. Ct. Rep. 240-4).

"Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from the evidence *may lead*, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that, in all such cases, he has claimed in the state

court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the act of Congress needs no justification."

(*St. Louis, I. M. & S. R. Co.* v. *Taylor,* 210 U. S. 281, 28 Sup. Ct. Rep. 620.)

"4. The evidence will be analyzed by the Federal Supreme Court on a writ of error to a state court to the extent necessary to give the plaintiff in error the benefit of its asserted Federal Right." (Fourth proposition of the syllabus in the case of *North Carolina R. Co.* v. *Zachary,* 232 U. S 248, 58 L. Ed. 592).

"3. A contention in a state court in an action based solely upon a Federal statute, that there was no evidence tending to show liability under that statute, presents a Federal question which, when denied, will support a writ of error from the Federal Supreme Court to the highest state court." (Third proposition of the syllabus in the case of *St. Louis I. M. & S. R. Co.* v. *McWhirter, Administratrix,* 229 U. S. 265, 57 L. Ed. 1179, 33 Sup. Ct. Rep. 862).

"2. The United States Supreme Court may examine the entire record, including the evidence, if properly incorporated therein to determine whether what purports to be a *general finding of facts against* one party necessarily involves the decision of questions of law bearing upon a Federal right claimed by such party in the state court."

(*Kansas City S. R. Co.* v. *C. H. Albers Com. Co.,* 223 U. S. 573, 56 L. Ed. 556; 32 Sup. Ct. Rep. 316.)

"2. The Federal Supreme Court, on writ of error to a state court, may analyze the facts in order to determine whether that which purports to be a finding of fact is so interwoven with the Federal question as to be in substance a decision of such question."

(*Norfolk & W. R. Co.* v. *Conley, Atty. Gen.,* 236 U. S. 605, 35 Sup. Ct. Rep. 437.)

The provisions of the Fourteenth Amendment to the United States Constitution,

"relate to and cover all the instrumentalities by which the state acts, and so it has been held that whoever, by virtue of a public position under a state government, deprives another of any right protected by that amendment against deprivation by the state, violates the constitutional inhibition."

(*Raymond* v. *Chicago Union T. Co.,* 207 U. S. 42, 28 Sup. Ct. Rep. 12.)

"A state court can not, by resting its judgment upon some ground of local or general law, defeat the appellate jurisdiction of the Supreme Court of the United States, if a Federal right or immunity was especially set up or claimed, which, if recognized and enforced, would require a different judgment."

(First clause of Syllabus in *West Chicago St. Ry. Co.* v. *State of Ill. ex rel.,* 201 U. S. 506, 26 Sup. Ct. Rep. 518.)

"The Supreme Court of the United States is not without jurisdiction to review by writ of error, a decision of a state court sustaining a state statute claimed to impair contract obligation, because the state court rests its conclusion of the *nonexistence* of the contract upon a construction of the state constitution and laws. * * *

The *non-existence* of a contract was rested on the construction (by the *state* court) of the constitution and laws of the *state,* and hence defendant in error contends that the decision of the (state) court did not involve a Federal question. This, however, overlooks the *power* and *duty* of *this* court to *determine for itself* the existence or non-existence of a contract."

(*Attorney Gen. of the State of Mich.* v. *Lowry, et al.,* 199 U. S. 233, 26 Sup. Ct. Rep. 27.)

Plaintiff in error, in case at bar, likewise, contends that where the provisions of a contract introduced in evidence, as a *defense* to the cause of action on which he is sued, is treated by a state court as *nonexisting,* by refusing to allow the jury to consider it in evidence, the U. S. Supreme Court, on a writ of error should "determine for itself the existence or nonexistence of such a contract" and the power of the state court to ignore such contract and thereby deprive defendant of its benefits which he claims to be entitled to under the Federal constitution whenever sued by the other party to such contract who is the *only* person who has *violated* the terms of said contract.

In referring to a class of statutes imposing upon railroad companies the duty to fence their right of way under which a liability is imposed for failing to obey the command of such statutes, Black in his work on Constitutional Law, 2nd Ed. 351, says:

"But such statutes cannot go beyond the imposition of such a penalty in cases where the fault lies at the door of the company. If the law * * * does not give the company an *opportunity* to *show facts* in *its* own *defense, it is void.*"

In *People* v. *O'Brien,* 11 N. Y. 1, 18 N. E. Rep. 692, it is held:

"Due process of law means an opportunity to appear *and be heard in defense,* in a tribunal which hears *and considers* the evidence *before* it pronounces judgment or takes property."

"Whatever else may be uncertain about the definition of the term 'due process of law,' all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure, and *without* an *opportunity* for a hearing."

(*Ochoa* v. *Morales,* 33 Sup. Ct. Rep. 1041, 230 U. S. 139.)

"The police power rests upon necessity and the right of self protection, but *private property* cannot be arbitrarily invaded under the mere guise of police regulation, nor forfeited for the *alleged violation of law by* its *owner,* nor destroyed by way of penalty inflicted upon him, without *opportunity to be heard.*"

(Opinion by Mr. Chief Justice Fuller in case of *Lawton et al.* v. *Steele,* 14 *Sup. Ct. Rep.* 503, 152 U. S. 133.)

In the case last cited, the opinion of the court was written by Mr. Justice Brown, who in referring to the "police power" says:

"To justify the state in thus interposing its authority in behalf of the public, it must appear—First, that the *interests* of the public generally, as distinguished from those of a particular class, require such interference, and, second, that the *means are reasonably necessary* for the *accomplishment of the purpose,* and not unduly *oppressive* upon *individuals.* The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with *private* business, or impose unusual and unnecessary restrictions upon lawful occupations, in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but subject to the *supervision* of the *courts.*"

Plaintiff in error herein, contends that the operation and effect of the state statute on which the alleged cause of action is based, as construed, applied and enforced by the Kansas courts is just the same as if said statute had expressly provided as follows:

(1) That the owner of a manufacturing establishment must *personally* guard all machinery when practicable, and if the owner, in order to comply with the statute, makes a contract with an expert mechanic to guard such machinery and have full control of the operation of said establishment as if he were the owner, and such expert mechanic, though paid a good salary for performing that duty, wrongfully fails to fulfill his contract by performing that contractual duty and is injured *solely* because of *his own* failure to guard the machinery when he is in the very act of "adjusting" it, then such expert mechanic can sue the owner and say in substance: I contracted to guard the machinery for you and failed to perform my contract and was injured because I did not guard a machine; but I am entitled to recover damages from you for my injury because the statute says the "owner" must guard it.

(2) That such owner is not entitled, in any action brought by such expert mechanic and superintendent against him, to have the jury consider in evidence such contract, by which such superintendent agreed to guard the machinery when practicable and thereby *show* that the *owner* did *not owe any duty to such superintendent* of guarding the machine on which he was injured, but *that duty was owing from such superintendent to the owner.*

Is not such a statute in violation of the fundamental law of the land? If the statute did have those express provisions, would not this court declare it to be repugnant to the Fourteenth Amendment to the Constitution of the United States?

The rights asserted by plaintiff in error herein do not "depend upon the *form* of the state law, or even upon its *declared purpose,* but upon its *operation* and *effect* as *applied* and *enforced* by the state." *Coppage* v. *Kansas,* 35 Sup. Ct. 244, 236 U. S. p. 1, *supra.*

The positive and uncontradicted evidence of three witnesses (Mr. Bowersock, Mr. Dinsmoor and Mr. Hill), hereinbefore quoted (Trans. of Rec. pp. 25-31), showed conclusively that Sumner I. Smith did make such a contract with plaintiff in error by which said Smith contracted to operate the paper mill as if *he* were the owner and to *guard* all machinery when practicable, and the peremptory instruction (Trans. of Rec. p. 41) requested by plaintiff in error at the close of all the evidence for the jury to find a verict in his favor should have been given, as specified in Assignment of Error No. VIII. (Trans. of Rec. p. 79).

The Kansas courts in the application and enforcement of said statute refused to allow the jury to consider that contract as being in evidence by refusing to give instructions 4, 5 and 6 (Trans. of Rec. p. 42) requested by plaintiff in error, and on that subject instructed the jury that it was the duty of plaintiff in error, *J. D. Bowersock*, to safely guard the squeeze rolls, if the use of a guard were practicable, in order to prevent injury to said Sumner I. Smith; and further instructed the jury that the fact that Mr. Smith was the superintendent of said paper mill with authority to repair and *safeguard* the *machinery*, "will *not* constitute a defense in this action" (Trans. of Rec. p. 47).

Section 6 of said Kansas statute, *supra*, on which the alleged cause of action is based, *as written*, does *not* shut out from the owner a reasonable opportunity to submit to the jury in his defense all the facts bearing on the issue and only makes the proof of a *failure* to *guard* machinery, when practicable, a *prima facie* liability of the owner; but said statute, as *construed, applied* and *enforced* in case at bar by the *courts* of Kansas, makes proof that the machinery was not guarded a *conclusive presumption* and *precludes* the *plaintiff in error* herein from showing that by the *contract* between him and superintendent, Sumner I. Smith, the said Smith had *full charge* of the *operation* of said paper mill, as if said Smith was the owner, and by which contract said Smith

agreed to guard all machinery and was injured *solely* because *he* failed to do so, without *any fault* on the part of plaintiff in error, or the failure on the part of plaintiff in error to perform *any duty* which *he owed to said Sumner I. Smith.*

The legislature may impose statutory duties and prescribe penalties for failure to perform those duties; but they cannot go beyond the imposition of a penalty in cases where the fault lies at the door of the owner of the property.

If the law does not give the owner "an *opportunity* to *show facts* in its own *defense it* is void." Black on Constitutional Law, 2nd Ed. 351, *supra.*

> "The owner of property *cannot* be *excluded* from *showing the truth* by a mere *legislative declaration* to that effect."
>
> (Opinion of the court by Dillon, J., in the case of *Allen* v. *Armstrong,* 16 Iowa, 508.)

> "An act which fixes absolute liability on a corporation to make compensation for injuries done to property in the prosecution of its lawful business, without any wrong, fault or neglect on its part, when under the general law of the land, no one else is so liable under such circumstances, does not provide the 'due process of law' under the bill of rights and is void.
>
> Due process of law implies the right of the person affected thereby * * * to *be heard,* by testimony, or otherwise, and to have the *right* of *controverting,* by proof, *every* material fact which bears on the question in the matter involved. If *any* question of *fact* or *liability* be *conclusively* presumed against him, this is *not* due process of law. We have held that it is within the power of legislation to declare that certain proofs shall be *prima facie* evidence of specified facts. But, at the same time, we decided that the legislature could not constitutionally ordain that such proofs should be *conclusive* evidence of material facts in controversy. The first is a mere rule of evidence. The last has been characterized as a confiscation of property.
>
> We have said above that the statute under discussion dispenses with all proof of the most material element of the wrong it seeks to redress. It declares that the railroad corporation shall make reparation for an injury inflicted in the authorized prosecution of its lawful business, without a sem-

blance of fault; * * * and yet, the statute will not allow the railroad to *exculpate itself*, by *proof* of the *highest qualifications* and *most watchful vigilance. This falls short of due process of law.*" (*Zeigler* v. *South & N. Ala. R. Co.*, 58 Ala. 599.)

"In the case of *O. & M. Ry. Co.* v. *Lackey*, 78 Illinois, p. 55, an Illinois Statute, making railroad companies liable for all expenses of a coroner's inquest, and the burial of all persons who died on the cars, or who was killed by collision or other accident to such cars, was construed by the Supreme Court of that State, in an opinion rendered by Mr. Justice Breese, who said:

'An examination of the section will show that no default, or negligence of any kind, need be established against the railroad company; but they are mulcted in heavy charges if, notwithstanding all their care and caution, a death should occur on one of their cars, no matter how caused, even if by the party's own hand. Running of trains by these corporations is lawful and of great public benefit. It is not claimed that the liability attaches for a violation of any law, the omission of any duty, or the want of proper care and skill in running their trains. The penalty is not aimed at anything of this kind. We say penalty, for it is in the nature of a penalty, and there is a constitutional inhibition against imposing penalties where no law has been violated or duty neglected. Neither is pretended in this case, nor are they in the contemplation of the statute. A passenger on the train dies from sickness. He is a man of wealth. Why should his burial expenses be charged to the railroad company? There is neither reason nor justice in it; and if he be poor, having not the means for a decent burial, the general law makes ample provision for such cases.'

The New York Court of Appeals in the case of *Ives* v. *Railway Co.*, 201 N. Y. 271, 94 N. E. 431, held that 'the legislature may abolish the fellow-servant rule and the law of contributory negligence, as they apply to the question of liability of a master for injury to his servant'; but decided that the statute entitled 'An Act to Amend the Labor Law in Relation to Workmen's Compensation in Certain Dangerous Employments' was an unconstitutional taking of liberty and property without due process of law, *if the employer was not at fault.* In rendering the decision the court says:

"The argument that the risk to an employe should be borne by the employer, because it is inherent in the employment, may be economically sound; but it is at war with the

legal principle that no employer can be compelled to assume a risk which is *inseparable* from the *work* of the *employe*, and which may exist in spite of a degree of care by the employer far greater than may be exacted by the most drastic law. If it is competent to impose upon an employer who has omitted no legal duty and has committed no wrong a liability based solely upon a legislative fiat that his business is inherently dangerous, it is equally competent to visit upon him a special tax for the support of hospitals and other charitable institutions, upon the theory that they are devoted largely to the alleviation of ills primarily due to his business. In its final and simple analysis that is taking the property of A and giving it to B; and that cannot be done under our constitutions. Practical and simple illustrations of the extent to which this theory of liability might be carried could be multiplied *ad infinitum*, and many will readily occur to the thoughtful reader.' "

"The United States Supreme Court, in *Lochner* v. *New York*, 198 U. S. 45, 25 S. C. Rep. 546, in deciding the New York statute, limiting employment of bakeries to 60 hours a week and 10 hours a day, was in violation of the U. S. Constitution, and not a valid exercise of the police power of the state, said:

'The purpose of a statute must be determined from the natural and legal effect of the language employed; and whether it is or is not repugnant to the Constitution of the United States must be determined from the *natural effect* of such statutes when *put* in *operation*, and not from their proclaimed purpose.' "

In the above case (25 S. C. Rep. 542, *supra*), the court also says:

"It must, of course, be conceded that there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this general proposition. Otherwise the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power, and it would be enough to say that any piece of legislation was enacted to conserve the morals, the health, or the safety of the people; such legislation would be valid, no matter how absolutely without foundation the claim might be. The claim of the police power would be a mere pretext—become another and delusive name for the supreme sovereignty of the state to be exercised free from constitutional restraint. This

is not contended for. In every case that comes before this court, therefore, where legislation of this character is concerned, and where the protection of the Federal Constitution is sought, the question necessarily arises: Is this a fair, reasonable, and appropriate exercise of the police power of the state, or is it an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty, or to enter into those contracts in relation to labor which may seem to him appropriate or necessary for the support of himself and his family? Of course the liberty of contract relating to labor includes both parties to it. The one has as much right to purchase as the other to sell labor.

This is not a question of submitting the judgment of the court for that of the legislature."

In case at bar, plaintiff in error, was entitled to have the jury consider the testimony which was introduced in evidence showing that he was not at fault; that Sumner I. Smith was the only person at fault and was injured solely because he failed to guard machinery which he had obligated himself to guard; that if said Smith had fulfilled the obligations of his contract he would not have been injured, as the machine would have been guarded as required by the statute; and that Sumner I. Smith, had he lived, would not have been entitled to recover damages for his injury which he, alone, caused without any fault on the part of plaintiff in error.

The rulings and actions of the Kansas Courts in *excluding* such evidence from the *consideration of the jury*, by refusing to give said instructions requested by plaintiff in error, deprived plaintiff in error of his constitutional rights as specified in Assignments of Error IX to XV, which are set out in the Transcript of Record, pp. 79 to 82.

Such evidence on behalf of plaintiff in error did not show a delegation of statutory duty; but was evidence of a step in the performance of that duty, by the best means known to plaintiff in error. Of course, if any other person employed in said paper mill (except Mr. Smith himself) had been injured because of a failure to guard machinery, plaintiff in error would certainly be liable to such injured person.

In an action by a coal miner against his employer, based on a statute of Missouri which provides:

> "The owner, agent or operator, of every coal mine * * * *shall provide* and *maintain* for every such mine a good and sufficient amount of ventilation for such men as may be employed therein,"

the Kansas City Court of Appeals held that the statute imposed on the employer a

> "*positive nondelegable duty,* * * * But this rule does not imply that the master must perform the task of maintaining a safe place for his servant with *his own hands,* or that he is forbidden to *require* a servant to keep his own place in order, though the task be within the scope of the servant's skill and experience. It is *not a delegation of duty but is a step in the performance thereof.* * * * On his own presentation of the case plaintiff's injury was caused, *not* by any *negligence* of *defendant, but* by *his own* admitted *negligence* and proved *disobedience,* and the court erred in not peremptorily directing a verdict for defendant" (*Perry* v. *N. W. Coal & M. Co.,* 175 S. W. 142).

Section 7843 of the Revised Statutes of Missouri, Vol. 2, 1909, of Article VI "General Provisions for Health and Safety of Employes," reads as follows:

> "All scaffolds or structures used in or for the erection, repairing or taking down of any kind of building shall be well and safely supported, and of sufficient width, and so secured as to insure the safety of persons working thereon, or passing under or about the same, against the falling thereof, or the falling of such materials or articles as may be used, placed or deposited thereon. All persons engaged in the erection, repairing or taking down of any kind of building shall exercise due caution and care so as to prevent injury or accident to those at work or near by."

In the application and enforcement of said statute the Supreme Court of Missouri in *Williams* v. *Ransom,* 234 Mo. 71, says:

> "*Justice* has not been so far *thwarted* by this *statute* as to make it necessary to hold that although a servant *is hired to build* a scaffold and then work on the same, yet the master is liable to the servant, although such *servant* is negligent in *constructing* the scaffold."

In an action based on the Federal statute of 1908, commonly known as the Federal Employers' Liability Act, applicable to railroads by which the employer is *prohibited* from making *any contract* with an employe, which will exempt the employer from liability under that act, and all such contracts are declared to be void, this court held the railroad company was not liable for the death of a person who made a contract with the railroad company to do certain work and who was not an ordinary employe, but was a person who had *control* of all the *details* of the work which he was to perform and the employer had control "over results only," and not *how* the work should be done.

In delivering the opinion of this court, Mr. Justice McKenna says:

> "We pass to the assignments of error based on the *rulings* upon the *evidence* and in *giving* and *refusing instructions*. The *determining* question is the *relation* in which *Turner* stood to the company. * * *
>
> Mr. Bowman, station agent and yardmaster of defendant, testified:
>
> 'Q. From whom did Turner get instructions about handling work performed by him?
> A. Under his contract from us.
> Q. You directed him what to do?
> A. Yes, either me or my chief clerk.
> Q. So, that he was under your supervision and control all the time?
> A. In so far as his contract were concerned, yes, sir.
> Q. He performed his duties in accordance with what you directed him to do?
> A. Yes, sir.
> Q. I will ask you if all this coal he handled for the chutes, if that was Rock Island coal?
> A. Yes, sir.'
>
> To which testimony this must be added:
>
> 'Q. Did you have anything to do with directing him in *detail* as to how he performed the terms of his contract?
> A. No, sir.'
>
> ***The railroad company, therefore did not retain the right to direct the manner in which the business should be done as well as the results to be accomplished, or, in other words did***

not retain control not only of what should be done, but how it should be done. * * *

Turner was something more than a mere shoveler of coal under a superior's commands. He was an independent employer of labor, *conscious* of *his own power* to direct and willing to assume the responsibility of direction and to be judged by its *results.* * * * We certainly cannot say that he was incompetent to assume such relation and incur its consequences." Judgment reversed.

(*Chicago, R. I. & P. R. Co.* v. *Bond, Admr. of the Estate of William L. Turner, Deceased,* 240 U. S. 449, 36 S. C. R. 403.)

Likewise in case at bar, under the assignments of error (8 to 15, Trans. of Rec., pp. 78-82) based on the *rulings,* upon the *evidence* and the giving and refusing instructions, "the *determining* question is the *relation* in which" Sumner I. Smith stood to J. D. Bowerstock, plaintiff in error herein,

Mr. Bowerstock testified about as follows: "As to *details* and the *manufacture* of *paper,* I probably may be said to have *nothing* to do with it;" that he looked to the *superintendent* of the mill to look after the *details* of *paper making* and machinery and the *care* of the machinery;" that the duties of Sumner I. Smith were "to make paper, look after the men and affairs of the mill," and to have *direct control* thereof, to superintend the plant, "look after machinery and safeguard it" (Trans. of Rec., 26-7).

Mr. Dinsmoor and Mr. Hill both testified, in substance, that Sumner I. Smith before agreeing to the terms of the contract, which made him superintendent of the said paper mill, stated that if he became superintendent he "did not want it to be a case of three or four bosses;" that he must have charge of mill, men and machinery; that he was given the "absolute control" of the operation of said mill, with power and duty to guard the machinery, when practicable; and that *the judgment* of Smith as to the practicability of guarding all machinery governed as against the opinion of any other person (Trans. of Rec., pp. 30-3).

As the testimony of those three witnesses was positive and uncontradicted, and showed that the relation of Sumner I. Smith to plaintiff in error, was such as to give Mr. Smith absolute

authority and supervision of the paper mill in all the details; and that under his contract it was his duty to exercise that authority and guard the machine on which he was killed solely because he failed to do so, the court should have allowed the jury to consider such evidence, as a defense to the alleged cause of action instead of instructing the jury, in substance that such evidence was not a defense and refusing to give the instructions requested by plaintiff in error.

The operation and effect of the state statute as applied and enforced in case at bar deprives plaintiff in error of the *right to contract,* which is within the protection of that part of the 14th Amendment to the Federal Constitution, that guarantees to every citizen the protection of liberty and property. One of the essential attributes of property is the right of the owner *to contract in* reference thereto.

In the case of *Coppage* v. *State of Kansas,* 35 S. C. R. 246 (236 U. S. 1, *supra*), this court held that a Kansas statute which was enacted in March, 1903 (at the same session of the legislature when the statute involved in case at bar was passed, was void, on account of said statute being an arbitrary interference with the *liberty to contract.*

In delivering the opinion of the court Mr. Justice Pitney, among other things, says:

> "Constitutional freedom of contract does not mean that a party is to be as free after making a contract as before; he *is not free to break it without accountability."*

After said contract was made between plaintiff in error and Sumner I. Smith, whereby said Smith became the superintendent, under a contractual obligation to guard all machinery when practicable, each of said parties became "responsible in damages for a violation of this contract" (*Coppage* v. *Kansas,* 236 U. S. 1, *supra*), consequently if plaintiff in error was compelled to expend any money, for example, to an employe injured on a machine which was not guarded when it should have been, then *Sumner I.*

Smith in *failing* to *guard* the *machine* would be "responsible in damages" *to* said *plaintiff in error* for any amount which plaintiff in error was compelled to pay such injured employe.

If said Smith, himself, received an injury on an unguarded machine which he had contracted to guard, then plaintiff in error, who had not violated any contract, would not be liable to Smith, who was injured by his own failure to guard the machine, and any statute imposing such a liability on plaintiff in error to Smith, under such a state of facts, would be in violation of said 14th Amendment to the Federal Constitution.

In referring to the "right to contract," this court, in the case of *Adair* v. *United States,* 208 U. S. 161, 28 S. C. R. 280, said:

> "In all such particulars the employer and the employe have equality of right, and any legislation that disturbs that *equality* is an arbitrary interference with the *liberty of contract* which no government can legally justify in a free land. * * * Of course, if the parties *by contract* fixed the period of service, and prescribed the *conditions* upon which the contract may be terminated, such *contract would control the rights* of the parties *as between themselves,* and for *any violation* of those provisions the party *wronged* would have his appropriate remedy in civil action."

From the above decision, Mr. Justice McKenna dissents and as his reason therefor says:

> "There are rights which when exercised in a *private business* may *not be* disturbed or limited. With *them* we are not concerned. We are dealing with a *quasi public business,* and therefore subject to control in the interest of the public" (28 S. C. R. 286, *supra*).

There are many authorities which hold that statutes designed to regulate the terms of a contract of employment in a strictly *private business* are unconstitutional because they operate as an interference with a person's natural liberty to contract.

In case at bar, the legislature had no power to prohibit J. D. Bowersock from contracting with Sumner I. Smith and obligating said Smith to take charge of the paper mill as superintendent and guard all machinery, than it would to prohibit said Sumner I.

Smith making such a contract. They must be given equal rights in order to meet the requirement of due process of law.

The paper mill was owned by J. D. Bowersock, plaintiff in error, in his capacity as a private citizen and was a private business in the strictest sense of the word. Manufacturing establishments are strictly private enterprises for the benefit of individuals, though the public may be benefited in a collateral way.

> "A *statute* which authorizes a town to issue bonds in aid of a *manufacturing enterprise* of an individual is *void*, because the taxes necessary to pay the bonds would, if collected, be a transfer of the property of individuals to aid the projects of gain and profits of others, and *not* for a *public use*, in the proper sense of that term."
>
> (*Loan Association* v. *Topeka*, 20 Wall. 661.)

In case at bar, the paper mill owned by plaintiff in error was his private property and in the exercise of its ownership, he was at *liberty to contract* with Sumner I. Smith to *take charge of* said paper mill as superintendent and *guard all the machinery*, and any legislative restriction imposed upon plaintiff in error to the effect that such contract with said Smith cannot be used in evidence *as a defense* in an action by Smith, or his personal representative, against plaintiff in error, based on the allegation that guards were not used on a machine on which said Smith was killed, is in violation of said 14th Amendment to the Constitution of the United States.

Said Kansas statute, as construed, applied and enforced in case at bar by said courts, is also repugnant to said 14th Amendment to the U. S. Constitution for the further reason that it denies plaintiff in error of the "equal protection of the law."

The declared purpose of the Kansas legislature, in Section 8 of said statute, is to include corporations, which means that *corporation owners* of manufacturing establishments, must either have machines guarded by *some person who enters into a contract to guard* them, *or* that *if* the *owner* is a *corporation* the machinery need not be guarded. The plain *intent* of the legislature is *ex-*

pressly declared to *include corporations*, and therefore *corporations cannot be excluded* from the provisions of said statute.

It is entirely impossible to compel a *corporation, itself*, to guard machinery.

Where a legislature expressly declares that it intends to include both corporation and natural persons neither can be excluded from the operation of the statute when enforced by the courts, and if *corporations* are given *a defense* in an action at law, based on that statute, which is *not* likewise *given to natural persons* in same kind of actions, then such statute, when *applied* and *enforced* by the courts *denies* to *natural persons* "the equal protection of the laws" and therefore unconstitutional.

In such cases the statute must fall as a whole for the entire act is invalid.

Connolly v. *Union Sewer Pipe Co.*, 22 S. C. R. 432.
American Sugar Refining Co. v. *McFarland*, 229 Fed. 287, affirmed in 241 U. S. 79, 36 S. C. R. 498.

In the cast last cited (241 U. S. 79, *supra*) this court, in affirming the ruling of the United States District Court, says:

> "We agree with the court below that the *act* must *fall as a whole*, as it falls in the sections *without which* there is *no reason to suppose that it would have been passed.*"

Likewise in case at bar there is no reason to suppose that the Kansas legislature would have enacted the statute involved unless *corporations* which own manufacturing establishments were to be included, for Sec. 8 specifically says that *corporations* are included.

Said statute as enforced by the Kansas courts, in case at bar, deprives J. D. Bowersock, plaintiff in error, of the right to have the jury consider in evidence, the terms and provisions of his contract with Sumner I. Smith *showing* that *said Smith* contracted to *guard* the *machine* on which he was injured, and therefore deprives plaintiff in error the right to make such a contract and use it as a defense.

The trial court instructed the jury that such evidence was no defense, and that J. D. Bowersock personally was required to guard

the machine in order to protect said Sumner I. Smith, regardless of any contract between said parties.

In the application and enforcement of said statute, when a corporation is sued as being the owner of the same kind of a paper mill in the same kind of an action, the corporation itself cannot possibly be compelled to guard machinery, which the statute says corporations must guard when practicable, consequently the corporation cannot be held liable under the same circumstances for its failure to guard machinery.

As a *corporation* must *guard* machinery, if owner of the property, it has the high and valuable privilege of *contracting with some person* who is a skilled mechanical engineer, whose experience enables him to know when a guard is practicable and when it is not. A corporation is necessarily given the *benefit* of an *expert* who is well qualified and knows how to *comply* with the *statute* relative to guarding machinery when practicable. If, however, the *owner* be a *private individual,* such as J. D. Bowersock, plaintiff in error herein, then *he* is deprived of those valuable privileges which a *corporation* is given. Most men, who invest their capital and own manufacturing establishments, do not possess the requisite skill and practical knowledge to *determine* when the use of a guard on machinery is practicable.

If a statute is so construed and enforced as to give one owner (a corporation) the right to contract with an expert, who knows *how* to guard machinery and comply with the statute in such a way as to relieve the corporation owner of liability for personal injuries, and does not give the same valuable rights to another owner who is not a corporation, then such a statute, when so construed, applied and enforced, denies to the owner, like plaintiff in error, who is not a corporation, the "equal protection of the law" demanded and required by the 14th Amendment of the United States Constitution.

Plaintiff in error contends that the evidence as disclosed by the record in case at bar shows that the Kansas courts in the construction and enforcement of the statute have deprived him of rights and imposed on him duties and burdens arbitrarily which a corporation cannot be deprived of and on which such duties cannot be imposed, and that the statute as so construed, applied and enforced denies him "the equal protection of the law."

"Unless the legislature may arbitrarily select one corporation or one class of corporations, or individual or one class of individuals, and visit a penalty upon them which is not imposed upon others guilty of like delinquency this statute cannot be sustained. * * * Arbitrary selection can never be justified by calling it classification. The equal protection demanded by the Fourteenth Amendment forbids this. *Gulf, Colorado & Santa Fe Railway* v. *Ellis*, 165 U. S. 150, 159, 17 Sup. Ct. 255, 258 (41 L. Ed. 666).

"A state may in its wisdom classify property for purposes of *taxation*, and the exercise of its discretion is not to be questioned in a court of the United States, so long as the classification does not invade rights secured by the Constitution of the United States. But different considerations control when the state, by legislation, seeks to regulate the enjoyment of rights and the pursuit of callings connected with *domestic trade*. In prescribing regulations for the conduct of trade, it cannot divide those engaged in trade into classes and make criminals of one class if they do certain forbidden things, while allowing another and favored class engaged in the same domestic trade to do the same things with impunity. It is one thing to exert the power of taxation so as to meet the expenses of government, and at the same time, indirectly, to build up or protect particular interests or industries. *It is quite a different thing for the state*, under its general police power, to enter the domain of trade or commerce, and discriminate against some by declaring that particular classes within its jurisdiction shall be exempt from the operation of a general statute making it criminal to do certain things connected with *domestic trade or commerce*. Such a statute is not a legitimate exertion of the power of classification, rests upon no reasonable basis, is purely arbitrary, and plainly denies the equal protection of the laws to those against whom it discriminates. *Connolly* v. *Union Sewer Pipe Company*, 184 U. S. 562, 22 Sup. Ct. 431, 46 L. Ed. 679."

A state statute is invalid, if, when put in force, it deprives an individual citizen of a right which said statute gives to a corporation, which is only a number of individuals associated together under a name.

> "The 'equal protection of the laws' to anyone implies not only that he has a right to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the enforcement of contracts, but also that he is exempt from any greater burdens or charges than such as are equally imposed upon all others under like circumstances. This equal protection forbids unequal exactions of any kind."
>
> *County of San Mateo* v. *Southern P. R. Co.*, 13 Fed. 722.

In an action against a railroad company by a father for the killing of his minor child, based on Sec. 2899 of the Alabama Code of 1876, providing that "when the death of any minor child is caused by the wrongful act or omission of any officer or agent of an incorporated company, or *private association of persons,* the father of such child, * * * may maintain an action against such corporation, or private *association of persons,* for such wrongful act or omission, and may recover such damages as the jury may assess," the Supreme Court of Alabama held the statute unconstitutional as it did not give any cause of action to the father if a railroad was owned by a single *individual* engaged in the same business, and said:

> "There must be no discrimination between *corporations* and natural persons in the matter of prosecuting or defending suits."

As an illustration the court said:

> "Manufacturing establishments * * * and even railroads may be owned and operated without incorporation, and by a single proprietor. These are not within the law; and for the death of a minor child, caused by the wrongful act or omission of an agent of such enterprise, neither father or mother can maintain a suit. If, however, there be more owners than one, or if the enterprise be incorporated, then the statute gives a right of action to the father, if living, and to the mother if he be dead. * * * How this will work will readily suggest itself. * * * Article 14 of the Amend-

ments to the Constitution of the United States declares that 'no state shall * * * deny to any person within its jurisdiction the equal protection of the laws.' Speaking of this provision, Justice Field, of the United States Supreme Court, in *County of San Mateo* v. *Southern P. R. Co.*, said: 'It not only implies the right of each to resort, on the same terms with others, to the courts of the country for the security of his person and property, the prevention and redress of wrongs, and the *enforcement* of *contracts*, but also his *exemption from any greater burdens* or charges than such are equally imposed upon all others under like circumstances."

Smith v. *L. & N. R. Co.*, 75 Ala. 450.

In *Deppe* v. *C. R. & P. R. Co.*, 36 Iowa, 54, the court says:

"Our legislature has enacted that 'every railroad company shall be liable for all damages sustained by *any* person, including *employes* of the company, in consequence of any neglect of the agents, or by any mismanagement of the engineer or other employe of the corporation to *any* person sustaining such damage. * * *

In *Ney* v. *The D. & S. R. Co.*, 20 Iowa, 347, it was held that 'in connection with railroads the term *employe* applies to conductors, agents, superintendents and *others* engaged in operating the road and the like, and *not* to contractors or *persons* building or *constructing* the roadbed or laying down the ties and rails.'

It was under this construction of the language of the statute that it was held constitutional. *But if the statute should be so construed as to apply to all in the employ* of railroad corporations *without regard to the business* they were employed in, *then it would be* a clear *case of class legislation*, and would *not* apply upon the same terms to *all* in the *same situation, and* hence *would be unconstitutional, and manifestly so.*"

In case at bar, the Kansas Supreme Court holds that "all persons employed in a manufacturing establishment are entitled to the protection of the factory act, *without regard* to the *nature* of their *employment*, their rank, or grade, * * * and it is further held, under the evidence, there is nothing in the *relations* of the parties to absolve the defendant from liability for the death of the superintendent which resulted from his failure to provide safeguards conceded to have been practicable and necessary to the safety of employes" (Trans. of Rec. p. 55).

Plaintiff in error contends, that such construction and *application* of said Kansas Statute makes it unconstitutional, for as decided by the Iowa Court (36 Iowa, 54, *supra*):

> "If the statute should be so construed as to apply to *all in the employ* of the railroad *without regard* to the *business* they were employed in, it would be a clear case of *class legislation*, and hence would be unconstitutional."

Likewise is a statute which gives a corporation greater rights or privileges than it does to a private individual.

The unconstitutionality of a statute because of discrimination in favor of a certain character of an employer (that is, corporation or natural person) *cannot be saved by the courts in determining each particular case.*

> "Making *all corporations* liable for injuries to employees through defective machinery, notwithstanding the employes had knowledge of the defect, when the *same liability is not placed on private individuals*, and there is *no distinctive difference in the business* which will warrant the classification, denies the corporations the equal protection of the law.
>
> A statute rendering all corporations liable for injuries to employes from defective appliances, whether the employe knew of the defect or not, cannot be saved from unconstitutionality because of discrimination in favor of individual employers *by the court's determining* in each particular case whether or not the corporation is engaged in a business so dangerous that such a rule might properly be applied to it."
>
> (First and third propositions of the syllabi in the case of *Elizabeth Ballard* v. *Mississippi Cotton Oil Co.*, 81 Miss. 507, 62 L. R. A. 407.)

In case at bar the Kansas statute requires corporation owners of paper mills to guard machinery when practicable but *necessarily* gives such owners the valuable right to contract with some expert mechanic whose superior knowledge and skill will be worth thousands of dollars to such an owner, in the placing and adjusting of the guards in such a manner, as to comply with the statute, and protect the employees from personal injury. By that same statute, as *construed, applied* and *enforced* in case at bar, plaintiff in error is discriminated against and is denied those rights and privileges which a corporation owner is given and allowed to exercise.

Plaintiff in error contends that said Kansas statute as construed, applied and enforced denied him of the equal protection of the law and deprived him of his right to show by the evidence that *he did not* fail in the performance of any duty which he *owed* to *said Sumner I. Smith.*

> "Where a duty is imposed for the protection of persons in *particular* situations or *relations* a *breach of it* which happens to result in *injury* to *one* in an altogether different situation *or relation* is *not, as to him, actionable.*"
>
> *St. Louis & I. M. R. Co.* v. *Conarty, Admtrx.,* 238 U. S. 243; 35 S. C. R. 786.

As plaintiff in error committed no wrong and fulfilled his obligations to Sumner I. Smith, he cannot be made liable by any legislative enactment.

> *Ohio & Miss. Ry. Co.* v. *Lackey,* 78 Ill. 55.
> *Conn.* v. *Herr,* 229 Pa. 132.
> *Dougherty* v. *Thomas,* 174 Mich. 371, 45 L. R. A. (N. S.) 699.

In the Michigan case last cited, the Supreme Court of that state held a statute unconstitutional which attempted to make an owner of automobile liable in damages to any person injured by such vehicle, when such owner was not in the wrong.

The above cases and others of the same class are referred to by the court of Massachusetts in *Madden* v. *Whittall Carpet Co.,* 222 Mass. 487, in deciding that the Workmen's Compensation Act of that state is valid because it is elective and not compulsory and says:

> "It is wholly optional with the employer, as with the employe, whether he comes under the provisions of the act or stays outside *and stands on his legal rights.*"

To the same effect is the holding of the Minnesota court in passing on the validity of a statute of that state.

In *Ole Mathison* v. *Minneapolis St. Ry. Co.,* 126 Minn. 286, L. R. A. 1916, D. 420, in referring to the workmen's compensation act says:

> "The rights, remedies and liabilities provided by part 2 are substituted for those previously existing, and the parties are limited thereto. It is competent for the *parties* to *enter* into such *an agreement*, especially if they are authorized by law so to do; and so long as the privilege is given them to elect whether they will or will not become bound by the provisions thereof, the *agreement is voluntary*, and none of the Constitutional rights of the parties are infringed by requiring that the terms of the agreement, if entered into, shall be prescribed by the act."

In case at bar, the statute involved imposes duties on plaintiff in error without his consent and against his wishes, and as *construed, applied* and *enforced by* the *Kansas courts* deprives him of his property when *he* was *not* at *fault* and gives it to the representative of the *only person who was at fault*, which is without due process of law and denies him of the equal protection of the law as specified in Assignments of Error (Trans. of Rec., 78-82) hereinbefore enumerated, which we ask this court to consider, as they all involve the right and power of the Kansas courts to construe, apply and enforce the said Kansas statute in such a manner as to deprive and deny plaintiff in error of his rights claimed and asserted under the 14th Amendment to the Constitution of the United States both in the trial court and in the highest court of the State of Kansas.

Plaintiff in error, therefore prays that the judgment of said District Court of Douglas County, Kansas, and said Supreme Court of Kansas may be set aside and reversed and held for naught; that plaintiff in error may have judgment granting him his just and lawful rights under the laws and Constitution of the United States, and that he may be restored to all things which he has lost by this action and because of said judgment of said District Court of Douglas County, Kansas, and the affirmance thereof by said Supreme Court of the State of Kansas.

Respectfully submitted,

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